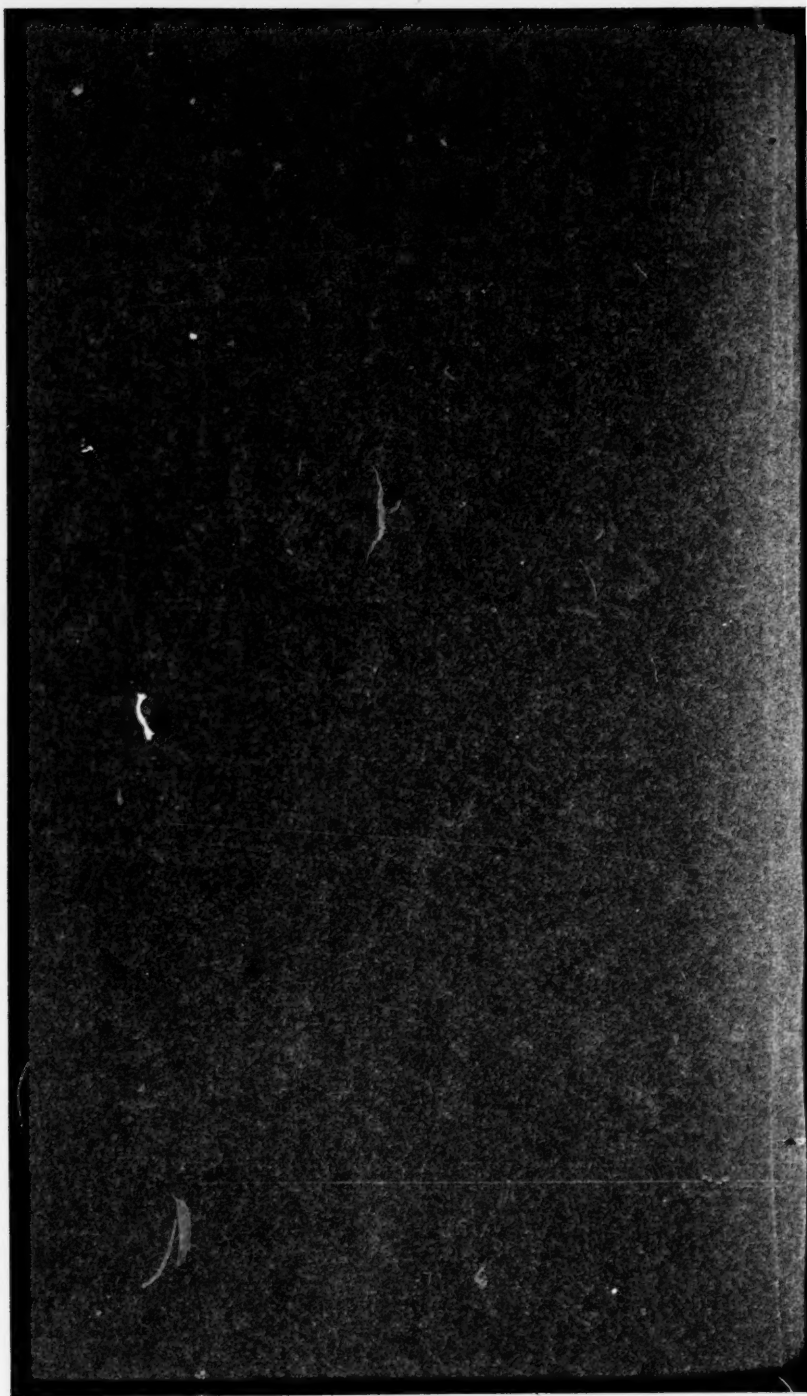


WILLIAM B. MASON, PRESIDENT

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WILLIAM B. MASON, PRESIDENT



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 626

EVELYN TREINIES, PETITIONER,

vs.

SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

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**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO, NORTHERN DIVISION**

In Equity. No. 1338

SUNSHINE MINING COMPANY, a Corporation, Plaintiff,

vs.

EVELYN H. TREINIES, SEATTLE-FIRST NATIONAL BANK (Spokane and Eastern Branch), Administrator With the Will Annexed of the Estate of John Pelkes, Deceased; Katherine Mason and T. R. Mason, Wife and Husband; Lester S. Harrison and Grace G. Harrison, Husband and Wife; Walter H. Hanson and Jane Doe Hanson, Husband and Wife; F. C. Keane; A. W. Hawkins, as the Duly Elected, Qualified and Acting Judge of the Superior Court of the State of Washington, in and for Yakima County; and J. C. Cheney, as Receiver, Defendants

BILL OF INTERPLEADER—Filed March 17, 1937

[fol. 9] Comes now the plaintiff and, for cause of action, complains and alleges:

1

That at all times herein mentioned the Sunshine Mining Company has been and now is a corporation organized and existing under and by virtue of the laws of the state of Washington, and has paid all license fees as required by the laws of said state. That at all times herein mentioned, said Sunshine Mining Company has been and now is authorized to do business in the state of Idaho and has complied with the laws of the state of Idaho relating to foreign corporations doing business within said state, and has paid all fees as required by the laws of said state.

2

That at all times herein mentioned defendant, Evelyn H. Treinies, has been and now is a citizen of the state of Washington, and resides in the city of Spokane, county of Spokane, state of Washington.

1—626

3

That at all times herein mentioned defendant, Seattle-First National Bank (Spokane and Eastern Branch) is a corporation organized under the national banking laws of the United States, and is the duly appointed, qualified and acting administrator with the will annexed in the matter of the estate of John Pelkes, deceased.

4

That at all times herein mentioned the defendants, Katherine Mason and T. R. Mason have been and now are wife and husband, respectively, and are citizens of the State of [fol. 10] Idaho, and reside in the city of Kellogg, county of Shoshone, state of Idaho.

5

That at all times herein mentioned defendants, Lester S. Harrison and Grace G. Harrison, were and now are husband and wife, and are citizens of the state of Idaho and reside in the city of Kellogg, county of Shoshone, state of Idaho.

6

That at all times herein mentioned defendants, Walter H. Hanson and Jane Doe Hanson, whose true Christian name is to plaintiff unknown, have been and now are husband and wife, and are citizens of the state of Idaho and reside in the city of Wallace, county of Shoshone, state of Idaho.

7

That at all times herein mentioned defendant F. C. Keane, has been and now is a citizen of the state of Idaho, and resides in the city of Wallace, County of Shoshone, state of Idaho.

8

That at all times herein mentioned defendant, A. W. Hawkins, has been and now is the duly elected, qualified and acting judge of the Superior Court of the state of Washington, in and for Yakima County. That at all times herein mentioned said defendant has been and now is a citi-

zen of the state of Washington, and a resident of the city of Yakima, county of Yakima, state of Washington.

9

That at all times herein mentioned defendant, J. C. Cheney, has been and now is the duly appointed, qualified and acting temporary receiver in the case of Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, Deceased, and Evelyn H. Treinies, plaintiffs, vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and Sunshine Mining Company, defendants, in the Superior Court of the state of Washington, in and for Yakima County, being Cause No. 29435 of the records and files [fol. 11] of the Clerk of said Court. That at all times herein mentioned said J. C. Cheney has been and now is a citizen of the state of Washington and a resident of the city of Yakima, county of Yakima, state of Washington.

10

That the amount in controversy exceeds the sum of \$3000.00, exclusive of interest and costs.

11

That heretofore and on or about the 4th day of August, 1934, the defendants herein, Katherine Mason and T. R. Mason, as plaintiffs, instituted suit in the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone, against John Pelkes, Frances Thinnies and Pierre Thinnies, her husband, Evelyn H. Treinies, and Sunshine Mining Company, a corporation, being Cause No. 7460 of the records and files of the office of the Clerk of said Court in the city of Wallace, state of Idaho. That in said suit said plaintiffs alleged that said John Pelkes, now deceased, had acquired 30,598 shares of stock in the Sunshine Mining Company; that said John Pelkes had sold and disposed of all of said stock except 16,000 shares thereof, which he had caused to be issued to the defendant herein, Evelyn H. Treinies. That said plaintiff, Katherine Mason, further alleged that of said 16,000 shares of stock standing in the name of Evelyn H. Treinies, she was the owner of 15,299 shares of said stock, and that

said Evelyn H. Treinies acquired said stock with knowledge of the rights of said plaintiff. That thereafter all of said defendants in said Idaho action appeared generally and a trial and such proceedings were had thereon which resulted in a decree in said Idaho Court adjudging and decreeing the plaintiff, Katherine Mason, to be the owner of 7649 shares of said capital stock, and the defendant, Evelyn H. Treinies, to be the owner of the balance of said 16,000 shares of stock. That said Frances Thinnies and Pierre Thinnies were dismissed from said proceeding prior to the decree entered therein. That said decree entered in said [fol. 12] Idaho action further provided that said Evelyn H. Treinies should surrender her said certificate of stock for cancellation, and that the Sunshine Mining Company, upon the surrender of said certificate of stock, should issue out to said Katherine Mason 7649 shares of said stock and further issue to Evelyn H. Treinies 8351 shares of said stock, and pay the dividends accrued to each of said parties on said stock according to their ownership as adjudged by said decree. That said decree further provided that in the event said Evelyn H. Treinies should fail or refuse to surrender her said certificate within ten (10) days after the date of entry of said decree the said Sunshine Mining Company should in that event cancel the said certificate of stock standing in the name of Evelyn H. Treinies and issue to the said Katherine Mason a certificate of stock for 7649 shares of said stock and pay to her the dividends accrued thereon and should issue to said Evelyn H. Treinies the remaining of said 16,000 shares upon her complying with said decree.

12

That thereafter, the defendants, John Pelkes, now deceased, and Evelyn H. Treinies and the Sunshine Mining Company appealed to the Supreme Court of the state of Idaho and plaintiffs, Katherine Mason and T. R. Mason, cross-appealed. That said John Pelkes and Evelyn H. Treinies failed to comply with the terms of said decree and surrender said certificate of stock, and the said Sunshine Mining Company, as a part of said appeal proceedings, and for the purpose of superseding and staying said decree, cancelled the said certificate of stock standing in the name of Evelyn H. Treinies and re-issued in lieu thereof said stock as follows: 7649 shares in the name of

Katherine Mason, and 8351 shares in the name of Evelyn H. Treinies, and deposited all of said stock with the Clerk of the District Court of the First Judicial District of the state of Idaho, in and for the county of Shoshone.

[fol. 13]

13

That thereafter such proceedings were had that on or about the 23rd day of July, 1936, the appeals of said parties were determined by the Supreme Court of the State of Idaho. That the decision of said Supreme Court modified the decision of the Trial Court and found Katherine Mason to be the owner of 15,299 shares of stock of the Sunshine Mining Company, together with the dividends accrued and accruing thereon, and ordered the Clerk of said Court to properly indorse said certificates and deliver the same to the said Katherine Mason. The decision further ordered said Sunshine Mining Company to recognize the ownership of said Katherine Mason in said 15,299 shares of stock.

14

That, pursuant to said decision in the Idaho Supreme Court and pursuant to the judgment and decree entered in accordance therewith, the Sunshine Mining Company did on the 20th day of August, 1936, cause to be issued to Katherine Mason, 15,299 shares of its stock, which were in lieu of said certificates deposited with the Clerk of said District Court of Idaho, and likewise said Sunshine Mining Company did on said date pay to said Katherine Mason dividends accrued and accruing thereon in the sum of \$42,225.24.

15

That thereafter said John Pelkes and Evelyn H. Treinies made application to the Supreme Court of the United States for a writ of certiorari to review the decision of the said Idaho Supreme Court and, as a part thereof, obtain an injunction pending appeal enjoining and restraining said Katherine Mason from transferring any of said certificates of stock or in any way disposing of said sum [fol. 14] of money paid to them as dividends. That thereafter the said Supreme Court of the United States denied the application of said John Pelkes and Evelyn H. Treinies for a writ of certiorari and said defendants, Katherine

Mason and T. R. Mason, are now in possession of said 15,299 shares of stock together with the dividends paid thereon by the Sunshine Mining Company, totaling \$42,-225.24, said amount being the dividends accrued on said 15,299 shares of stock from the 4th day of August 1934, to the 20th day of August, 1936.

16

That while said case was pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and before trial of said cause had been had, and on or about the 14th day of December 1934, the defendant herein, Katherine Mason, filed her petition in the matter of the Estate of Amelia Pelkes, Deceased, in the Superior Court of the State of Washington, in and for Spokane County, being Probate Cause No. 15496 of the records and files of the Clerk of said Court. That in said petition said Katherine Mason prayed for certain relief. That shortly thereafter said John Pelkes, now deceased, filed his petition in said probate cause. That subsequently thereafter said Katherine Mason dismissed her said petition, but such proceedings were had in said probate cause which resulted in a decree being entered in said probate cause on the 31st day of May 1935, wherein it was adjudicated that the said John Pelkes was the owner of said 30,598 shares of Sunshine Mining Company stock that had formerly stood in his name on the books and records of said Sunshine Mining Company. That following the [fol. 15] said 31st day of May, 1935, said John Pelkes presented the decree in said probate proceedings as a defense to the action then pending against him in said District Court of the First Judicial District of the state of Idaho, in and for the county of Shoshone, and said defense, together with other defenses submitted in behalf of John Pelkes, now deceased, was duly considered by said Trial Court and Supreme Court of the State of Idaho.

17

That while the appeal of said Idaho case was pending in the Supreme Court of the State of Idaho and on or about the 12th day of August 1936, John Pelkes, now deceased, and Evelyn H. Treinies, as plaintiffs, instituted in the Superior

Court of the state of Washington, in and for Spokane County, suit against Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and Sunshine Mining Company, wherein said plaintiffs alleged that they — the owners of all of said 16,000 shares of stock in the Sunshine Mining Company and further alleged that the District Court of the state of Idaho had no jurisdiction over them, and that they were not bound by the decree entered by said District Court of the First Judicial District of the state of Idaho, in and for the county of Shoshone, and further alleged that the defendants, Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson and F. C. Keane, claimed to have some interest in said stock, and prayed that title of said plaintiffs to said 16000 shares of stock be quieted in the said plaintiffs, and that the [fol. 16] Sunshine Mining Company be compelled to recognize the ownership of said John Pelkes and Evelyn H. Treinies in and to all of said 16,000 shares of stock. That while said cause was pending and on the 16th day of October 1936, said John Pelkes died, and said Seattle-First National Bank (Spokane and Eastern Branch) was appointed as administrator with the will annexed of the Estate of John Pelkes, deceased, as hereinbefore alleged, and substituted as a party plaintiff in said cause.

18

That on or about the 11th day of January 1937, the said Supreme Court of the United States denied the application for writ of certiorari to review the decision of the Idaho Supreme Court, and on said date an order was entered without notice to any of the defendants named in said case pending in the Superior Court of the State of Washington, in and for Spokane County, appointing J. C. Cheney as temporary receiver to take into his possession as such the undivided interest in the assets of the Sunshine Mining Company of which the cancelled certificate of stock held by Evelyn H. Treinies is alleged to be the indicia of ownership. That said J. C. Cheney filed his oath and bond and qualified as such receiver, and has attempted and is attempting to take into his possession an undivided interest in the assets of the Sunshine Mining Company as alleged to be evidenced by said cancelled certificate of stock of the Sunshine Mining Com-

pany standing in the name of Evelyn H. Treinies. That upon the appointment and qualification of said J. C. Cheney as temporary receiver, said Sunshine Mining Company gave notice that it would not recognize the said ownership of said Katherine Mason and T. R. Mason in and to said 16,000 shares of stock during the pendency of the litigation [fol. 17] and until such time as the final adjudication of all the parties named as defendants in this action is made in and to said stock and the dividends accrued and accruing thereon.

19

That thereafter and on or about the 19th day of January, 1937, said Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, deceased, and Evelyn H. Treinies filed in said case in the Superior Court of the State of Washington, in and for Spokane County, being Cause No. 98,427, their amended complaint, and thereafter such proceedings were had that said cause was transferred from the Superior Court of the State of Washington, in and for Spokane County, to the Superior Court of the State of Washington, in and for Yakima County. That motions and demurrers have been made by the defendant, Sunshine Mining Company, and the defendants Walter H. Hanson and Jane Doe Hanson, to said amended complaint, and the matters argued, and said argument is now under advisement by the Honorable A. W. Hawkins, Judge of the Superior Court of the State of Washington, in and for Yakima County.

20

That the principal place of business of the Sunshine Mining Company is located in the county of Yakima, state of Washington, and the said Sunshine Mining Company is subject to the jurisdiction of the Superior Court of the State of Washington, in and for Yakima County, in said cause now pending and is likewise subject to the jurisdiction of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, said Sunshine Mining Company being a foreign corporation doing business [fol. 18] in the state of Idaho as hereinbefore alleged and likewise all of its mining properties being located within said Shoshone County, Idaho.

21

That the Sunshine Mining Company does not now claim and has not at any time herein mentioned, claimed any interest in said 16,000 shares of capital stock or the dividends accrued or accruing thereon, and is disinterested as to what party or parties shall be adjudged to be the owner or owners of said stock and the dividends accrued or accruing thereon. That the Sunshine Mining Company now has in its possession as accrued dividends on said 15,299 shares of stock, being the dividends payable on September 30, 1936, at the rate of 50¢ per share, and December 15, 1936, at the rate of 75¢ per share, the sum of \$19,123.75, in which amount the Sunshine Mining Company has no interest and which has been paid into the registry of the above entitled Court before the institution of this suit.

22

That the defendants, Katherine Mason and T. R. Mason, have asserted and are asserting their rights to said 15,299 shares of stock in said Sunshine Mining Company and the dividends accrued and accruing thereon, and have demanded that the Sunshine Mining Company comply with the decree of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, as modified by the decision of the Supreme Court of the state of Idaho, and further demanded that said Sunshine Mining Company immediately pay all dividends accrued on said stock to them and immediately permit them to transfer said stock, and that in the event said Sunshine Mining Company fails to comply with said demand, said Katherine [fol. 19] Mason and T. R. Mason have threatened to and will take immediate steps to sue the Sunshine Mining Company for damages which they allege will result from its failure to comply with said Idaho decree. That the said stock fluctuates in value and said plaintiff will suffer immediate and irreparable loss and damage unless a temporary restraining order is issued.

23

That the defendants, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn

H. Treinies have asserted and are asserting that they are not bound by the decree of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone as modified by the Supreme Court of the State of Idaho, and have demanded that the Sunshine Mining Company recognize their said ownership to said stock and the dividends accrued and accruing thereon, and that the Sunshine Mining Company immediately pay the dividends to them and immediately permit them to transfer said stock, and that in the event of its failure to do so that the said Sunshine Mining Company will be held liable for damages and subject to suit therefor. That said parties in the case now pending in Yakima County have caused a temporary restraining order to be issued and served upon the Sunshine Mining Company restraining said company from in any way transferring the stock during the pendency of said action, and have further prayed for damages against the said Sunshine Mining Company resulting to them by reason of its failure to recognize the ownership of said parties in said stock. That said plaintiff herein is subject to immediate and irreparable injury, loss or damage should the value of [fol. 20] said stock for any reason decrease.

24

That the defendants, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Jane Doe Hanson, husband and wife, F. C. Keane, and J. C. Cheney, as Receiver, have or claim to have some interest in said stock hereinabove referred to and the dividends accrued and accruing thereon, the extent or amount of said interest of said defendants, if any, in and to said stock being unknown to this plaintiff.

25

That the said plaintiff herein, Sunshine Mining Company, is disinterested as to the interest of said defendants, and each of them, as to the title to said stock or the dividends accrued and to accrue thereon in the future. That the two decrees of the state courts, namely, the decree of the Idaho court and the decree in the probate proceedings in the Washington court, as hereinabove alleged, purport to establish inconsistent rights of ownership to said stock and dividends accrued and to accrue thereon. That said

decrees of said respective state courts result from separate actions instituted in separate states by some of the defendants herein and have resulted in conflicting results.

26

That the case now pending in the Superior Court of the State of Washington, in and for Yakima County, is under advisement by the defendant, A. W. Hawkins, Judge, and said plaintiff believes and therefore alleges the facts to be that said Judge will now at any time render his decision in regard to the restraining order issued in the receivership proceedings, and that after said decision said plaintiff [fol. 21] herein will be subject to further litigation in regard to said matter. That said plaintiff is advised and believes and therefore alleges the facts to be that, if the said decision of said A. W. Hawkins, Judge, upholds the decree of the Washington state court, said defendants Katherine Mason and T. R. Mason will immediately institute proceedings in the District Court of the First Judicial District of the State of Idaho in and for the county of Shoshone, for receivership proceedings against said Sunshine Mining Company and to cite all of the officers of said company subject to the jurisdiction of that court for contempt proceedings for the failure of this said company to comply with the decree of said Idaho court.

27

That the plaintiff herein has been and will be subject to a further multiplicity of suits. That the plaintiff is in great doubt as to whom it should recognize as owner or owners of said stock and cannot safely recognize any defendant as the owner of said stock and pay dividends accrued and accruing thereon without being subject to a great hazard and an immediate possibility of being subject to a double liability. That an emergency exists and the plaintiff herein will be subject to immediate and irreparable injury, loss or damage, which is not within its power to avoid unless said defendants, and all of them, be immediately restrained without notice from taking any further proceedings in the Idaho and Washington state courts. That a restraining order without notice should be forthwith issued restraining said defendants and each of them, from proceeding or attempting to proceed further in either the Idaho case or the Washington case. That said plaintiff alleges that said de-

[fol. 22] fendants, and each of them, be cited to appear and interplead in this said action and thereby settle and adjust their claims among themselves as to the title of said stock and the dividends accrued and accruing thereon. That said defendants, Seattle-First National Bank (Spokane and Eastern Branch), as administrator with the will annexed of John Pelkes, deceased, and Evelyn H. Treinies be restrained from in any way transferring or attempting to transfer the said certificate of stock now in their possession evidencing 16,000 shares of capital stock of Sunshine Mining Company, and that said parties, and each of them, be compelled to surrender said stock to the registry of the above entitled court to be held pending the final judgment herein. That said defendants, Katherine Mason and T. R. Mason be restrained from transferring said certificates of stock in their possession evidencing 15,299 shares of capital stock in the Sunshine Mining Company, or from in any way attempting to dispose of said certificates or shares evidenced thereby, and that said defendants be cited and required to surrender said certificates of stock into the registry of the above entitled court pending the final judgment determining the ownership thereof, and that said parties be further restrained from in any way disposing or transferring said \$42,225.24 paid to them as dividends on the stock, and that said defendants be cited and required to deposit said money with the registry of the above entitled court pending the final judgment herein. That the plaintiff is without any plain, speedy or adequate remedy at law.

Wherefore, Plaintiff prays that notice and subpoena issue [fol. 23] to said defendants herein, and each of them, to appear and make answer to this bill of complaint in interpleader, and that said defendants, and each of them, be decreed to interplead herein together and set up their respective rights to said 15,299 shares of stock and the dividends accrued and accruing thereon; that judgment and decree be entered herein adjudging and decreeing which of said defendants is the true owners of said stock and the dividends accrued and accruing thereon; that a temporary restraining order be issued immediately and without notice restraining said defendants, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, Evelyn H. Treinies, Katherine Mason and T. R. Mason, their agents, attorneys and

representatives, and each of them, from disposing or attempting to dispose of or transfer any of the shares of stock in the Sunshine Mining Company standing in their name on the records of said company, and further restraining said defendants, Katherine Mason and T. R. Mason, from disposing or attempting to dispose of the dividends paid to them on the stock in the Sunshine Mining Company standing in their names on the records of said company, and that said parties, and each of them, be cited and required to surrender all of said certificates of stock into the registry of the above court pending the final determination of this said action; that said defendants, and each of them, be immediately restrained without notice from attempting to take any further proceedings or action in regard to said stock hereinabove mentioned and the dividends accrued and accruing thereon pending the trial and final disposition of this said action; that all of said defendants, and each of them, be cited to appear and show cause, if any they have, why said temporary restraining order should not be made in full [fols. 24-25] force and effect pending the final determination of this said action; that said defendants, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, Deceased, Evelyn H. Treinies, Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and J. C. Cheney, as Receiver, be required and compelled to interplead in this said action and set up their respective claims to said stock together with the dividends accrued and accruing thereon, and fully litigate all of their respective rights or alleged rights thereto; that this plaintiff be discharged from any and all further liability herein except its obligation to recognize the true owner of said stock and the dividends accrued and accruing thereon, when said owner or owners are determined by decree of the above entitled court; that the plaintiff recover such sum as the court shall adjudge reasonable as its attorneys' fees and its costs herein incurred, to be paid out of the stock and dividends accrued and accruing thereon; and for such other and general relief as to the court may seem just and equitable in the premises.

Nat U. Brown, C. W. Halverson, James E. Gyde,
Solicitors for Plaintiff.

Duly sworn to by R. M. Hardy. Jurat omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER AS TO EVIDENCE—Filed March 31, 1937

Application having been made to the above-entitled court for leave to have the hearing to be had upon the order to show cause heretofore issued out of the above-entitled court and made returnable on the 8th day of April, 1937, upon oral evidence to be introduced at said hearing, and good cause appearing therefor,

Now, Therefore, it is Hereby Ordered and this does order that the applying defendants may introduce oral evidence of the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and also the oral evidence of Charles S. Boren, the reporter who took the testimony at the trial of a certain action entitled In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, Katherine Mason and T. R. Mason, her husband, Plaintiffs, vs. John Pelkes, Evelyn H. Treinies, Frances Thinnes and Pierre Thinnes, wife and husband, and Sunshine Mining Company, a corporation, Defendants.

Dated at Boise, Idaho, this 31st day of March, 1937.

Charles C. Cavanah, District Judge.

[fol. 27] IN UNITED STATES DISTRICT COURT

RETURN OF A. W. HAWKINS TO SHOW CAUSE ORDER—Filed
April 6, 1937

Comes now the defendant A. W. Hawkins, as the duly elected, qualified and acting Judge of the Superior Court of the State of Washington, in and for Yakima County, and by way of return to the show cause order issued by this Honorable Court in the above entitled action on the 17th day of March, 1937, alleges:

1

He refers to the allegations contained in his answer filed herein, and prays that by this reference they may be incorporated herein to the same extent as though here set out in extenso.

2

Because of the matters above referred to, this respondent has grave doubts as to his duties with reference to the action now pending before him, and expresses his readiness to hold that litigation in abeyance until advised by this Honorable Court of its opinion on the various questions raised in his answer.

3

In order that J. C. Cheney, the receiver appointed by the Superior Court of the State of Washington, who has in his possession the subject matter involved in the litigation now pending before this respondent, which is the identical subject matter involved in the litigation now pending before this Honorable Court, may not be placed in the position of being subject to inconsistent orders which might be issued by the two courts involved, he has been directed by this respondent to hold the property in his possession [fol. 28] in statu quo until this respondent is advised by this Honorable Court of its opinion in the matter.

Wherefore, this respondent renews the prayer set out in his answer that he be advised by this Honorable Court of its determination of the various questions submitted to it in respondent's answer.

A. W. Hawkins, Judge of the Superior Court of Yakima County, Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT A. W. HAWKINS—Filed April 6,
1937

Comes now the defendant A. W. Hawkins as the duly elected, qualified and acting Judge of the Superior Court of the State of Washington in and for Yakima County, and makes the following admissions and denials to the bill of interpleader filed herein:

[fol. 29]

1

Admits the allegations contained in paragraph 1 thereof.

2

Admits the allegations contained in paragraph 2 thereof.

3

Admits the allegations contained in paragraph 3 thereof.

4

Admits the allegations contained in paragraph 4 thereof.

5

Denies that Grace G. Harrison resides in the city of Kellogg, County of Shoshone, state of Idaho, and admits the remainder of paragraph 5.

6

Admits the allegations contained in paragraph 6 thereof.

7

Admits the allegations contained in paragraph 7 thereof.

8

Admits the allegations contained in paragraph 8 thereof.

9

Admits the allegations contained in paragraph 9 thereof.

10

Admits the allegations contained in paragraph 10 thereof.

[fol. 30]

11

Defendant alleges that he does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 11 and therefore denies the same.

12

Defendant alleges that he does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 12 and therefore denies the same.

13

Defendant alleges that he does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 13 and therefore denies the same.

14

Defendant alleges that he does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 14 and therefore denies the same.

15

Defendant alleges that he does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 15 and therefore denies the same.

16

This defendant admits that the defendant Katherine Mason filed her petition in the matter of the estate of Amelia Pelkes, deceased, in the Superior Court of the State of Washington in and for Spokane County; that John Pelkes filed certain petitions in said cause and that a decree was entered therein on the 31st day of May 1935, wherein it was adjudged that said John Pelkes was the owner of the 30,598 shares of Sunshine Mining Company stock therein [fol. 31] referred to, and denies the other allegations contained in paragraph 16.

17

Defendant admits paragraph 17.

18

In answer to paragraph 18, defendant does not have sufficient information to form a belief as to the truth of the allegations therein contained that Sunshine Mining Company gave notice that it would not recognize the ownership of the defendants Katherine Mason and T. R. Mason in the 16,000 shares of stock therein referred to, and therefore denies the same. He admits the other allegations therein contained.

19

Answering paragraph 19, defendant admits the same.

20

In answer to paragraph 20, he admits that the principal place of business of the Sunshine Mining Company is in

Yakima County, state of Washington, and the said company is subject to the jurisdiction of the Superior Court of the State of Washington in and for Yakima County, and states that he does not have information sufficient to form a belief as to the remaining allegations contained in said paragraph and denies the same.

21

In answer to paragraph 21, defendant admits the allegations therein contained.

22

In answer to paragraph 22, defendant does not have sufficient information to form a belief and therefore denies the allegations therein contained.

[fol. 32]

23

Answering paragraph 23, defendant does not have sufficient information to form a belief and therefore denies the allegations therein contained.

24

Answering paragraph 24, defendant does not have sufficient information to form a belief and therefore denies the allegations therein contained.

25

Answering paragraph 25, defendant does not have sufficient information to form a belief and therefore denies the allegations therein contained.

26

In answer to paragraph 26, he denies the allegations therein contained save in so far as they are hereinafter expressly admitted in the affirmative matter set out in this answer.

27

Answering paragraph 27, defendant has not sufficient information to form a belief and therefore denies the allegations therein contained.

By Way of Affirmative Defense Hereto, defendant alleges:

Comes now the defendant A. W. Hawkins as the duly elected, qualified and acting judge of the Superior Court of the State of Washington in and for Yakima County, and alleges:

1

That at all times subsequent to the 18th day of September 1923, I was and now am the duly elected, qualified and acting judge of the Superior Court of the State of Washington in and for Yakima County.

[fol. 33]

2

That on to-wit: the 28 day of Jan. 1937, an action entitled "First National Bank, Spokane and Eastern Branch, Administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn Treinies, plaintiffs, vs. Katherine Mason, T. R. Mason, Lester R. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane, and Sunshine Mining Company, defendants," being No. 98427 in the Superior Court of the State of Washington in and for Spokane County, was ordered transferred from that court to the Superior Court of the State of Washington in and for Yakima County for trial, and thereafter was duly assigned to this defendant for argument on demurrers which had been interposed by the defendants Sunshine Mining Company, Walter H. Hanson, Jane Doe Hanson and Grace G. Harrison to the amended complaint of the plaintiffs. Together with the files in that cause, the files in the Matter of the Estate of Amelia Pelkes, deceased, being No. 15496 in the Superior Court of the State of Washington in and for Spokane County sitting in probate, were also ordered transferred from that Court, and were transferred and were before me for consideration in connection with the said demurrers.

3

Those files disclosed the following proceedings were had In the Matter of the Estate of Amelia Pelkes, deceased, being No. 15496 in the Superior Court of the State of Washington in and for Spokane County sitting in probate:

One Amelia Pelkes had died testate, a resident of Spokane County, in April 1922. Her surviving husband John

Pelkes was appointed her executor by the Superior Court in that county, and continued to act as such until he was regularly discharged by that court on May 31, 1935. In- [fol. 34] cluded in the assets of that estate was the community interest of the testatrix in 30,598 shares of the capital stock of the Sunshine Mining Company, a Washington corporation with its principal place of business in the City of Yakima, in the county of the same name. This stock, together with other mining stock in which the deceased owned a community interest, was not inventoried or in any way called to the attention of the court until the 19th day of December, 1934. However, on the 8th day of August 1923, a decree of distribution was entered which distributed all of the property of the estate which had been inventoried, in the following proportions: Three-fourths to the said John Pelkes and one-fourth to Katherine Mason. She is one of the defendants in this action and appears to have been the daughter of the testatrix by an earlier marriage. The decree of distribution also contained a residuary clause purporting to distribute all undescribed property to the same persons in the same proportions. No receipts were filed by the heirs, and this is a requirement of the laws of the state of Washington, and no steps were taken to discharge the executor or to close the estate, but it continued in this condition until December 19, 1934. On that date Katherine Mason filed her petition in these proceedings, alleging generally that she was a daughter of the testatrix and entitled to a one-fourth interest in the assets under her mother's will; that the estate had never been closed, nor its administration concluded; that she had never filed her receipt for her distributive share; that John Pelkes had been guilty of misconduct in failing to inventory [fol. 35] and offer for probate certain property of the estate, including the stock of the Sunshine Mining Company above referred to; and that, by reason thereof, he was guilty of such misconduct as to require his removal as executor. Whereupon she prayed that he be required to account to the court for the property which had been withheld from probate; that he be removed as executor; and that an individual whom she then nominated, be appointed to act in his stead as administrator with the will annexed.

John Pelkes appeared in response to a citation issued by the court based on the said petition. His return to the citation is lengthy, and set up a number of affirmative de-

fenses. The essence, however, was that Katherine Mason was familiar with the assets of the estate; knew that John Pelkes had failed to inventory the mining stock, including that in the Sunshine Mining Company; and had consented to his failure because at the time both he and she felt the stock to be valueless. He admitted that he had withheld the stock from probate, and admitted that he had failed to procure receipts from the heirs and to file the same, and that the administration had not been concluded. He further alleged that he and Katherine Mason had entered into a partition agreement immediately after the entry of the decree of distribution above referred to, by which she had agreed to take in lieu of her distributive share, certain mortgages and bonds having a ready money value, while he took in lieu of his distributive share, the mining stocks above referred to, including that in the Sunshine Mining Company, and certain real estate situated in Spokane County. He further alleged that Katherine Mason was conducting litigation in the courts of Idaho which appears to be the same litigation which is referred to by the plaintiff in its bill in interpleader, and which, as John Pelkes then alleged, was for the purpose of procuring an interest in the identical block of stock of the Sunshine Mining Company in which she was seeking to establish an interest by her petition filed in the probate proceedings. He prayed that she be restrained from further proceeding in the Idaho litigation; that it be adjudged that he had fully accounted for all the property of the estate of Amelia Pelkes, and had conveyed to Katherine Mason all of the property of the estate to which she was entitled; and finally prayed that the estate be closed, and he be discharged from further liability as executor therein.

A demurrer was interposed to the return by Katherine Mason and overruled, and a temporary restraining order was entered prohibiting her from conducting the litigation in Idaho.

Thereupon the cause was set for trial on the issues raised by the petition of Katherine Mason and the return of John Pelkes, and Katherine Mason was ordered to submit herself for examination on oral interrogatories under the laws of the State of Washington. Whereupon Katherine Mason and T. R. Mason, who is her husband, applied separately to the Supreme Court of the state of Washington for writs of prohibition to restrain the Superior Court from proceed-

ing further in the matter, either by way of taking her deposition or restraining her from proceeding in the courts of [fol. 37] Idaho or from hearing the issues on the questions of fact. The basis of these applications was that the Superior Court of the State of Washington sitting in probate lacked the inherent jurisdiction to do and to hear the things and matters that court was then proposing to do and hear. These applications for prohibition were argued before the Supreme Court, which denied each of them, and remitted the cause to the Superior Court for further proceedings. Under the laws of the State of Washington, the denial of these applications for writs of prohibition by the Supreme Court of this state was equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues raised by the petition of Katherine Mason and the return of John Pelkes above referred to.

Thereafter such proceedings were had that the Superior Court adjudged Katherine Mason to be in contempt for her failure to submit to examination on oral interrogatories pursuant to the orders of that court. Immediately upon that adjudication Katherine Mason filed in that court what purported to be a receipt for her distributive share of the assets of the estate of Amelia Pelkes, deceased, and upon filing this receipt moved to dismiss her petition filed in the proceeding on December 19, 1934. No ruling was had on this motion, and John Pelkes immediately filed a petition alleging that the receipt which she had filed was inaccurate in that it purported to acknowledge that she had received an undivided one-half interest in trust in the mining stock above referred to, and he prayed that she be required to file a receipt accurately showing what she had received. [fol. 38] Thereupon she filed a second receipt to which John Pelkes also took exception, and ultimately a third receipt. Pelkes filed a second petition in which he objected to each of the receipts filed, on the ground that none of them was accurate or correct. In it he further alleged that he and Katherine Mason had entered into a partition agreement which was, in substance, the same as that he referred to in his return to Katherine Mason's petition, and prayed the court that it might determine the terms of such partition agreement, that it find that Katherine Mason had no right, title or interest in or to the Sunshine stock, and, after making such determination, that it compel Katherine Mason to file a receipt for the property which she had received

pursuant to the partition agreement. He further prayed that, upon the filing of correct and accurate receipts, the estate should be closed and he discharged from further liability as executor.

This petition was served on Katherine Mason through her counsel, but she failed to plead in response to an order of the court to plead. A decree was then entered on May 31, 1935, in which the court found, as a fact, that the partition agreement was as alleged by John Pelkes, that Katherine Mason had no right, title or interest in the block of stock in the Sunshine Mining Company above referred to, and it required Katherine Mason to file a receipt in accordance with that finding. The decree further provided that in the event of her failure so to file, it should be effective as a receipt. It also provided that the estate was fully administered upon and closed, and discharged John Pelkes from further liability as executor therein.

[fol. 39]

4

This defendant has not had an opportunity to inspect the files or proceedings in the various courts of Idaho referred to by the complainant in its bill of interpleader, but is informed and believes, and therefore alleges the fact to be, that all of those proceedings were instituted subsequent to the institution of the probate proceedings above referred to, and for the purpose of acquiring an interest in the same block of stock in the Sunshine Mining Company which is involved in those proceedings.

5

On to-wit: the 11 day of Jan., 1937, Evelyn H. Treinies, who claims to have derived her interest from John Pelkes subsequent to the agreement of partition entered into between him and Katherine Mason, applied for and procured in the action entitled "Seattle First National Bank, Spokane and Eastern Branch, Administrator with the will annexed, etc., and Evelyn Treinies vs. Katherine Mason, et al.", which has been above referred to, an order appointing the defendant J. C. Cheney as receiver of the Superior Court of the State of Washington for the purpose of taking into his possession and holding as such, the stock of the Sunshine Mining Company which is the subject of all the litigation referred to both in the bill of interpleader and in all the

proceedings referred to. Thereafter the said J. C. Cheney as such receiver did take the undivided interest in the assets of the Sunshine Mining Company, title to which is or purports to be evidenced by the conflicting certificates of stock referred to herein, and still retains it subject to the order of this court. Service of the amended complaint of the above [fol. 40] named plaintiffs was had upon the defendants Walter H. Hanson, Jane Doe Hanson, Grace G. Harrison, and the Sunshine Mining Company, personally, within this state; and service was also had on Katherine Mason, T. R. Mason, Lester R. Harrison and F. C. Keane by serving them with a copy of the amended complaint personally in the state of Idaho. The effect of such service under the law of this state is equivalent to regular service by publication.

The demurrers of the defendants served in this state in that action to the amended complaint of the plaintiffs therein have been extensively argued before me and submitted to me as judge of the Superior Court of the State of Washington, and that action was pending before me in this condition at the time of service upon me of the subpoena ad respondendum, the bill of interpleader, and the temporary restraining order and show cause order issued herein by this Honorable Court.

6

It is the opinion of this court that the Superior Court of the State of Washington in and for Spokane County while sitting in probate, had exclusive jurisdiction over the estate of Amelia Pelkes, the assets thereof, the heirs, and all disputes between them involving title to those assets, until the entry of the decree of that court on May 31, 1935, and that it was its duty upon the issues presented to it, to inquire into whether or not a partition agreement had been entered into between John Pelkes and Katherine Mason subsequent to the entry of the decree of distribution on August 8, 1923, and to ascertain the terms thereof, adjudicate the rights of the par-[fol. 41] ties arising from such agreement in the assets of the estate, including the stock in the Sunshine Mining Company, and compel the heirs to file accurate receipts showing the property they had received under the partition agreed upon between themselves, and that, until this was done, the court had continuing jurisdiction not only of the heirs, but also of the property of the estate, and that it was a court of exclusive jurisdiction, so that no other court had the power

to hear any controversy between those heirs relating to that property; and that the aforesaid decree of that court was a final adjudication in rem which prevented all other courts from entertaining litigation between Katherine Mason and John Pelkes or their privies involving any claims to the stock on the Sunshine Mining Company conflicting with that decree.

It is my opinion that these proceedings were entirely regular and in conformity with the procedure laid down by the statutory law of this state. In substance, the plaintiffs have relied on these proceedings in the amended complaint now before me, and it is my opinion that they have stated a cause of action entitling them to a decree quieting title in the stock now in the possession of the receiver of this court, unless their allegations are refuted. This being true, I am confronted with the problem of whether or not I may relinquish or transfer jurisdiction over property which is within the territorial limit of my court and within the possession of an officer of my court, and in which a litigant before me has, in my judgment, established a prima facie title. If I had the power to do this, I would be eager to take such [fol. 42] steps as might be suggested to me by this Honorable Court to enable it to fully dispose of the issues which may be presented to it by the parties now before it, because I appreciate that since its jurisdiction of the persons of the defendants is wider than that of the court of which I am a member, it can the more readily afford such relief as may be necessary to safeguard the successful litigants by restraining those who are unsuccessful from instituting additional litigation. But the doubt still remains in my mind that I have the power to divest myself of a jurisdiction which I have acquired over property which is impounded by an officer of this court.

It is further my opinion that, upon the institution of the action which is now pending before me and the appointment of J. C. Cheney as receiver of this court and his impounding of the stock as such, this court became a court of exclusive jurisdiction, proceeding in rem to determine title to property which was in the possession of its receiver, and that for the purpose of such determination it has acquired jurisdiction of all the parties defendant in the action now pending before me, and that for that reason it is doubtful whether any other court, including this Honorable Court, has juris-

diction to determine the rights of these parties in that property.

7

These questions therefore present themselves to me:

[fol. 43] First. Is it the intent of the so-called Federal Interpleader Act as now amended, when property has been impounded by a state court in such a manner that it has become a court of exclusive jurisdiction, to divest that Court of jurisdiction, and either require or permit it to transfer the property in its possession, assuming that it is capable of transfer, together with any litigation that may be pending before it, to a Federal Court for the determination of conflicting claims made thereto by parties who are residents of several states, over whom the state court has acquired jurisdiction in so far as is necessary to determine their rights in the property which it holds in its possession.

Second. If the Act does not either require or permit such divestiture of jurisdiction by a state court, may the bill of interpleader here filed be construed as calling to the attention of this Honorable Court a conflict in the decrees of the courts of two sister states, for the purpose of having it determined which is a valid decree, without attempting in any wise to directly affect the title to the property impounded by the Superior Court of Washington, and if the bill may be so construed, will such determination be binding on me as judge of the Superior Court of the State of Washington.

Another matter upon which I have some doubt arises from this situation: In my opinion the decree entered May 31, 1935, by the Superior Court of the state of Washington in and for Spokane County, is conclusive of the rights of the litigants before this court. Since the validity of that decree depends entirely on local law and procedure, are the [fol. 44] courts of this state to be concluded by an opinion of the Federal courts on the validity of that decree if, in the judgment of the state courts, such opinion incorrectly determines matters of purely local law relating to the jurisdiction and procedure of the Superior Courts of the state of Washington?

It is conceivable, of course, that this action may raise other questions that must be determined, but those I have stated touch so closely upon my duty to the litigants who are now before me that I desire to call them to the attention

of this Honorable Court for consideration. In due deference to its opinion, I shall refrain from taking any proceedings in the cause above referred to until such time as I am advised of the views of this Honorable Court.

8

In any event, it is my opinion that this Honorable Court has acquired jurisdiction over the sum of \$19,123.75, which the plaintiff has deposited with its clerk and which is alleged to be dividends that have accrued on the impounded stock.

Wherefore, this defendant prays that he be advised of the rulings of this Honorable Court on the matters which he has here called to its attention.

A. W. Hawkins, Judge of the Superior Court of Yakima County, Washington, Defendant.

[fol. 45] (Duly verified.)
(Service accepted.)

IN UNITED STATES DISTRICT COURT

ANSWER AND REPLY OF DEFENDANTS KATHERINE MASON AND T. R. MASON, WIFE AND HUSBAND; LESTER S. HARRISON AND GRACE G. HARRISON, HUSBAND AND WIFE; WALTER H. HANSON AND EDNA B. HANSON, HUSBAND AND WIFE; AND F. C. KEANE—Filed April 7, 1937.

Comes now Katherine Mason and T. R. Mason, wife and husband; Lester S. Harrison and Grace G. Harrison, husband and wife; Walter H. Hanson and Edna B. Hanson, husband and wife; and F. C. Keane, and for answer and reply, to the bill of interpleader filed in the above-entitled cause, admit, deny and allege:

I

These answering defendants admit all of the allegations contained in paragraph I of said bill of complaint.

II

Admit the allegations contained in paragraph of said bill of interpleader.

III

Admit the allegations contained in paragraph III of said bill of interpleader.

IV

Admit the allegations contained in paragraph IV of said bill of interpleader.

[fol. 46]

V

Admit all of the allegations contained in paragraph V of said bill of interpleader.

VI

Admit that the defendants Walter H. Hanson and Jane Doe Hanson, whose true name is Edna B. Hanson, are husband and wife, and are citizens of the State of Idaho and reside at Wallace, Shoshone County, Idaho.

VII

Admit the allegations contained in paragraph VII of said bill of interpleader.

VIII

Admit the allegations contained in paragraph VIII of said bill of interpleader.

IX

These answering defendants deny that the defendant J. C. Cheney has been or ever was the duly-appointed qualified or acting temporary receiver in the case Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies, Plaintiffs, vs. Katherine Mason and T. R. Mason; Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson (whose true name is Edna B. Hanson), F. C. Keane and Sunshine Mining Company, Defendants, in the Superior Court of the State of Washington, in and for Yakima County, being cause No. 29435 of the records and files of the clerk of said court. These answering defendants admit, however, that the said J. C. Cheney now is and has been a citizen of the State of Washington and a resident of the City of Yakima, County of Yakima, State of Washington.

[fol. 47]

X

These answering defendants admit that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

XI

These answering defendants admit all of the allegations contained in paragraph XI of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XII

These answering defendants admit all of the allegations contained in paragraph XIII of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XIII

These answering defendants admit all of the allegations contained in paragraph XII of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XIV

These answering defendants admit all of the allegations contained in paragraph XIV of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

[fol. 48]

XV

These answering defendants admit all of the allegations contained in paragraph XV of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XVI

These answering defendants admit all of the allegations contained in paragraph XVI of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XVII and XVIII

These answering defendants admit all of the allegations contained in paragraph XVII and XVIII of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XIX

These answering defendants admit all of the allegations contained in paragraph XIX of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

XX

These answering defendants admit all of the allegations contained in paragraph XX of said bill of interpleader, save and except as said allegations may be modified, changed or enlarged by the allegations to be found in the cross-complaint filed herewith by these answering defendants.

[fol. 49]

XXI

Answering paragraph XXI, these answering defendants admit that the Sunshine Mining Company, plaintiff, does not claim and has not at any time mentioned in said bill of interpleader claimed any interest in said 16,000 shares of the capital stock or the dividends accrued or accruing thereon, but deny that said Sunshine Mining Company is disinterested as to what party or parties shall be adjudged to be the owner or owners of said stock or the dividends accruing or accrued thereon. Admit that the Sunshine Mining Company has in its possession as accrued dividends on said 15,299 shares of stock the sum of \$19,123.75 and

admits that the Sunshine Mining Company has no interest in said amount, but these answering defendants allege that said sum of money belongs to the defendants Katherine Mason and T. R. Mason, her husband.

XXII

Answering paragraph XXII of said bill of interpleader, these answering defendants admit the allegations therein contained, save and except as the same are modified and/or enlarged in the cross-complaint filed herewith by these answering defendants.

XXIII

Answering paragraph XXIII of said bill of interpleader, these answering defendants have no knowledge or information as to what the defendants Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies have asserted and/or are asserting and for lack of such information and basing their denial thereon, these defendants deny that said defendants above named have asserted or are asserting that they are not bound by [fol. 50] the decree of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, as modified by the Supreme Court of the State of Idaho, and deny that they have demanded that the Sunshine Mining Company recognize their said ownership to said stock and dividends accrued or accruing thereon, but these defendants admit each and every other allegation contained in said paragraph XXIII of the bill of interpleader.

XXIV

Answering paragraph XXIV of said bill of interpleader, these answering defendants admit that the defendants, Lester S. Harrison, Grace G. Harrison, husband and wife, Walter H. Hanson, Edna B. Hanson, husband and wife, and F. C. Keane have and claim some interest in said stock hereinabove referred to and the dividends accrued or accruing thereon, but deny that the defendant J. C. Cheney, as receiver, has or claims to have some interest in said stock hereinabove referred to or the dividends accrued or accruing thereon, and these answering defendants allege that in truth and in fact the said defendant, J. C. Cheney,

as receiver or otherwise has no claim or interest in said stock hereinabove referred to or the dividends accrued or accruing thereon.

XXV

Answering paragraph XXV of said bill of interpleader, these answering defendants deny that the Sunshine Mining Company is disinterested as to the interest of said defendants or each or any of them as to the title to said stock or the dividends accrued or which will accrue thereon in the future; deny that the two decrees of state courts, namely, the decree of the Idaho court and the decree in the probate [fol. 51] proceedings in Washington, as in said bill of complaint particularly referred to, establish inconsistent rights of, in or to said stock or the dividends accruing or to accrue thereon; admit that said decrees of said respective state courts result from separate actions instituted in separate states by some of the defendants herein, but deny that the same have resulted in conflicting results.

XXVI

Admit all of the allegations contained in paragraph XXVI of said bill of interpleader.

XXVII

Admit the allegations contained in paragraph XXVII of said bill of interpleader.

For further answer to the bill of interpleader filed by the above-named plaintiff, and as a cross-complaint thereto, these answering defendants allege:

I

That at all times herein mentioned Sunshine Mining Company has been and it now is a corporation organized under and existing by virtue of the laws of the State of Washington, and that said corporation has heretofore complied with all of the laws, rules and regulations relating to foreign corporations transacting business within the State of Idaho and has qualified to do business within the State of Idaho, and has paid all fees as required by the laws of the State of Idaho, and as such is qualified to do business within the State of Idaho, and that the sole assets of said

plaintiff Sunshine Mining Company consist of a certain [fol. 52] mining property located in Shoshone County, State of Idaho, and certain personal property consisting of monies made by said plaintiff Sunshine Mining Company in the operation of said Sunshine mine located in Idaho, and that all of the business and assets of said plaintiff Sunshine Mining Company insofar as the operation of its principal business, to-wit, mining, is concerned, is carried on and transacted within the State of Idaho.

II

That the defendant Seattle-First National Bank (Spokane and Eastern branch) is a banking corporation organized under and existing by virtue of the laws of the United States of America and has its principal place of business in the city of Seattle, Washington; that heretofore and prior hereto and prior to the institution of the above-entitled action, said defendant Seattle-First National Bank (Spokane and Eastern branch) was appointed administrator with the will annexed of the estate of John Pelkes, deceased.

III

That at all times herein mentioned, the cross-complaining defendants, Katherine Mason and T. R. Mason, have been and they now are husband and wife, and at all times herein mentioned said defendants and each of them have been and now are citizens and residents of Shoshone County, State of Idaho.

IV

That the defendants Lester S. Harrison, Walter H. Hanson and F. C. Keane now are and at all times herein mentioned have been duly licensed and practicing attorneys [fol. 53] at law within the State of Idaho, and that the interest of said defendants in the above-entitled controversy arises out of services which have been rendered to the above-named cross-complaining defendants Katherine Mason and T. R. Mason, her husband, and that the only interest of said Grace G. Harrison and Edna B. Hanson, wives of Lester S. Harrison and Walter H. Hanson, respectively, consists of their community interest in the fees

which the said Lester S. Harrison and Walter H. Hanson have earned in the above-entitled cause.

V

That heretofore and on the 4th day of August, 1934, cross-complaining defendants Katherine Mason and T. R. Mason, instituted in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, a certain action in which said action John Pelkes, Evelyn H. Treinies, Frances Thinnies and Pierre Thinnies, her husband, and Sunshine Mining Company were named as defendants, and which said action thereafter and on the — day of September 1935, resulted in judgment being entered in favor of the plaintiffs therein, to-wit, Katherine Mason and T. R. Mason, her husband.

VI

That the purpose of the action so instituted by these cross-complaining defendants was to subject certain stock in the possession and under the control and domination of the defendant therein named, Evelyn H. Treinies, to a trust which had been created and had arisen in favor of cross-complaining defendant Katherine Mason therein, which said trust amounted to 15,299 shares of the capital stock of Sunshine Mining Company.

[fol. 54]

VII

That thereafter the defendants named in said action, to-wit, John Pelkes and Evelyn H. Treinies, appeared separately by demurrer and upon said demurrers being overruled, said defendants and each of them thereafter filed separate answers in said action pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, in which said answers said defendants and each of them alleged that prior to the institution of said action all of the stock involved in said action above described had been by the said John Pelkes transferred to the defendant Evelyn H. Treinies and that the said Evelyn H. Treinies was at the date of the institution of said action the sole and only owner of the stock involved in said action and that the only interest that the said defendant therein named, John Pelkes, had in said

stock was, in consideration of the transfer thereof by the said defendant John Pelkes to the defendant Evelyn H. Treinies, a right to support from the defendant Evelyn H. Treinies during the remaining years of his life.

VIII

That as above alleged, said transfer was absolute and the said John Pelkes, by reason of the making of said transfer, divested himself of all right, title, claim of interest or demand in or to said Sunshine stock which is here the subject of controversy, and in the event of a breach of said contract obligation on the part of said defendant Evelyn H. Treinies, the said defendant John Pelkes' only recourse was an action for damages by reason of such breach of contract.

[fol. 55]

IX

That thereafter and prior to the commencement of the trial of said action in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, as aforesaid, the defendant John Pelkes filed an amended and supplemental answer, in which said amended and supplemental answer he pleaded a certain purported decree which had been made by the Superior Court of the State of Washington, in and for the County of Spokane, and in said proceeding entitled "In the Matter of the Estate of Amelia Pelkes, Deceased," and under and by virtue of the terms of said purported decree, the said defendant John Pelkes claimed to have had certain stock distributed to him and that said decree so made by said Superior Court of Spokane County, State of Washington, was a final judgment and decree adjudging the said John Pelkes to be the owner thereof, and that said decree so plead constituted a bar to the right of recovery by the plaintiffs in said Idaho action.

X

That the defendant Evelyn H. Treinies, who, according to the sworn answer filed by said defendants John Pelkes and Evelyn H. Treinies in said Idaho action, was the actual owner of said stock free and clear of any claim by said defendant John Pelkes, failed to plead said purported final judgment made by said Superior Court of the State

of Washington, in and for the County of Spokane, in the matter of the estate of Amelia Pelkes, deceased, and failed to offer any proof showing or purporting to show that said judgment so made by said Superior Court of the State of Washington, in and for the County of Shoshone, was in [fol. 56] anywise binding on her, the said defendant Evelyn H. Treinies, and further failed to show that she stood in privity with the said defendant John Pelkes in the procurement of said judgment, or any facts which in any way would permit said judgment to be binding upon her, the said Evelyn H. Treinies, and these cross-complaining defendants allege the fact to be that the said defendant Evelyn H. Treinies actually waived and did not rely upon said purported final decree made by said Superior Court of the State of Washington, in and for the County of Spokane.

XI

That the defendant Evelyn H. Treinies, named in said Idaho action, failed to appear at the trial thereof, although she was represented by counsel thereat, and these cross-complaining defendants allege the fact to be that the said defendant Evelyn H. Treinies has studiously avoided coming within the jurisdiction of the Idaho Court throughout the progress of said action.

XII

That said action finally went to trial in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, upon the complaint filed by the plaintiffs Katherine Mason and T. R. Mason, and upon the answer filed by the defendant Evelyn H. Treinies and the amended and supplemental answer filed by the defendant John Pelkes therein named, and which said action was decided by said District Court of the First Judicial District on or about the 28th day of September, 1935, said judgment being in favor of the plaintiffs named therein [fol. 57] for 7649 shares of the capital stock of said defendant Sunshine Mining Company, and in which said decree the said District Court of the First Judicial District decreed that the defendant Evelyn H. Treinies was the owner of the remainder of said 16,000 shares of stock in said corporation.

XIII

That thereafter an appeal was taken to the Supreme Court of the State of Idaho by the defendants John Pelkes and Evelyn H. Treinies, and an appeal was also taken to the Supreme Court of the State of Idaho by the defendant Sunshine Mining Company, and for the purpose of superseding the judgment made by said District Court of the First Judicial District, said defendant named in said action, Sunshine Mining Company, the plaintiff named in the bill of interpleader filed herein, deposited with the Clerk of the District Court of the State of Idaho, First Judicial District, in and for the County of Shoshone, certificates of stock for 16,000 shares of the capital stock of Sunshine Mining Company, represented by said certificate for 16,000 shares mentioned in said bill of interpleader, said deposit being made for the purpose of staying the right of the plaintiffs named in said action and these cross-complaining defendants from proceeding with an execution on said judgment, and was made pursuant to the provisions of Sections 11-203, 209, Idaho Code Annotated, and for the further purpose of superseding said judgment and staying execution thereon, said defendant Sunshine Mining Company deposited with the Clerk of the District Court of the [fol. 58] First Judicial District of the State of Idaho, in and for the County of Shoshone, certain bonds made by the Aetna Casualty and Surety Company, in which said bonds said surety company guaranteed the payment of said judgment in so far as the same was payable in cash; and that at the time plaintiff herein, Sunshine Mining Company, made said deposit as aforesaid, it had full knowledge of the existence of the purported judgment relied on by the defendants Pelkes and Treinies in said Idaho action and had knowledge at said time that said defendants Pelkes and Treinies were relying thereon.

XIII

That the acts of the plaintiff named in this action, to-wit, Sunshine Mining Company, in depositing all of said stock with the clerk of the said district court for the purpose of superseding said judgment so made by the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, were approved by the defendants in said action, to-wit, Evelyn H. Treinies and John

Pelkes, and said attorneys for said defendants above named agreed to such action being taken.

XIV

That in the course of the trial of the above-entitled cause, the said defendants Pelkes and Treinies in said Idaho action failed to prove the laws of the State of Washington in relation to and in support of said purported final decree, which the said defendants relied on as a bar to plaintiffs' right to a recovery in said Idaho action.

[fol. 59]

XV

That thereafter said appeal was heard by the Supreme Court of the State of Idaho sitting en banc and thereafter and on the 23rd day of July, 1936, the Supreme Court of the State of Idaho made and entered herein its final judgment and opinion, in which said judgment the Supreme Court of the State of Idaho ordered and directed the District Court of the First Judicial District to correct and modify its decree entered in said action as hereinabove referred to and ordered and directed that said decree provide that Katherine Mason and her husband, T. R. Mason, were entitled to 15,299 shares of the capital stock of Sunshine Mining Company, such stock being represented by the certificates theretofore deposited with the clerk of said district court, by the Sunshine Mining Company. It further ordered, directed and required the said defendants Pelkes and Treinies to pay to the plaintiffs in said action the sum of \$19,000.00 and more, which they had collected on said stock as dividends and which money in good conscience belonged to the said Katherine Mason and T. R. Mason, plaintiffs.

XVI

That as a part of said opinion of the Supreme Court of the State of Idaho in said action as herein particularly referred to, the court decided that a restraining order which had been issued during the month of May, 1935, under and by virtue of the terms of which said restraining order the said defendants Pelkes and Treinies, together with their attorneys, were restrained from continuing with the prosecution of said action pending in the Superior Court of the [fol. 60] State of Washington, in and for the County of

Spokane, and entitled "In the Matter of the Estate of Amelia Pelkes, deceased," was a valid and binding order and the District Court of the First Judicial District thereafter determined and entered its decree that said purported final decree in said estate made as above referred to, was procured and taken in violation of said restraining order and that the same was not binding on the Idaho courts.

XVII

That as a part of said decree aforesaid, the said defendants John Pelkes and Evelyn H. Treinies were perpetually enjoined and restrained from commencing or prosecuting any action other than by appeal or certiorari from the Supreme Court of the State of Idaho to the Supreme Court of the United States, but in violation of said order and showing the same contempt for the order of the Idaho court that was manifested throughout the entire proceeding, said defendants Pelkes and Treinies immediately commenced the action referred to in the bill of interpleader, which said action is now pending in the Superior Court of Yakima County, State of Washington.

XVIII

That thereafter and after the entry of said judgment in the Idaho court as aforesaid, the plaintiff in the above-entitled action paid to these cross-complaining defendants the sum of \$42,225.24 and also issued to Katherine Mason certificates for 15,299 shares of the capital stock of the Sunshine Mining Company, which payment and delivery of stock was made by plaintiff, Sunshine Mining Company, with full knowledge of all of the facts in relation thereto and with full knowledge of the existence of said purported final judgment relied on by the defendants Pelkes and Treinies.

[fol. 61]

XIX

That thereafter the said defendants Pelkes and Treinies applied to the Supreme Court of the United States for a writ of certiorari and as an incident thereto said defendants procured from said Supreme Court of the United States a temporary restraining order restraining these cross-complaining defendants from in any manner disposing of the stock which had been delivered to them by plain-

tiff Sunshine Mining Company, and also restraining and enjoining these cross-complaining defendants from disposing of or spending any of the said \$42,225.24, and that acting pursuant to the order of said Supreme Court of the United States, said cross-complaining defendants and each of them abided by said order and kept said stock intact and also kept said funds available pursuant to the order of said Supreme Court of the United States.

XX

That the action taken by the said defendants Pelkes and Treinies in applying to the Supreme Court of the United States for a writ of certiorari was based solely and only on the ground that the Idaho court had failed, neglected and refused to give full faith and credit to the judgment of a sister state and relied on said purported judgment or decree made in the matter of the estate of Amelia Pelkes, deceased, by said Superior Court of the State of Washington, in and for the County of Spokane. That within a week or ten days after said matter had been presented to the Supreme Court of the United States, said Supreme Court of the United [fol. 62] States thereupon decided said petition for certiorari adversely and thereupon the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), acting as administrator with the will annexed of the estate of John Pelkes, deceased, the said John Pelkes having died while said matter was pending in the Supreme Court of the United States, in violation of the lawful order of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and in contempt of the lawful order of said latter-mentioned court, caused to be filed in the courts of the State of Washington a purported amended complaint, wherein they attempted to re-litigate the question as to the validity of said purported decree made by the said Washington court, and as an incident thereto the said defendants last above named fraudulently and wrongfully procured the appointment of one J. C. Cheney as receiver, although the said defendant J. C. Cheney never posted any bond other than a thousand-dollar bond for the faithful performance of his duties as such receiver.

XXI

That these cross-complaining defendants believe and therefore allege the fact to be that the sole purpose of the

defendants herein named, to-wit, Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), and J. C. Cheney, acting as receiver in said Washington proceedings, is that of harassing, vexing and annoying these cross-complaining defendants.

[fol. 63]

XXII

That at the time said defendants instituted said proceedings by filing said amended complaint in said Washington proceeding, the stock of the Sunshine Mining Company, which stock is listed on the New York Curb Exchange, was selling readily for around \$21.00 per share, and that since said time said stock has depreciated in value to a point where it is now selling at \$19.00 per share, and that by reason of the wrongful acts of said defendants Seattle-First National Bank (Spokane and Eastern branch), Evelyn H. Treinies and the said J. C. Cheney, acting as receiver as aforesaid, these cross-complaining defendants have been damaged in a sum of more than \$30,000.00, and that at all times from and after the date of the remittitur and order made by the Supreme Court of the United States in case No. 379, October term 1936, John Pelkes and Evelyn H. Treinies being the petitioners therein named, against Katherine Mason and T. R. Mason, her husband, these cross-complaining defendants have been entitled to have the dividends paid on said 15,299 shares of stock therefore delivered to the cross-complaining defendant Katherine Mason by the plaintiff named in the bill of interpleader, to-wit, Sunshine Mining Company, said amount being in excess of \$19,000.00, and have also been entitled to sell, assign and transfer all of the stock represented by said certificates delivered to the cross-complaining defendant Katherine Mason, but that by reason of the wrongful and unlawful acts of the defendants Evelyn H. Treinies and J. C. Cheney, [fol. 64] purporting to act as receiver, said plaintiff Sunshine Mining Company has refused to recognize an assignment thereof and has notified these cross-complaining defendants that no transfer or endorsement of said certificates would be recognized by the said plaintiff, Sunshine Mining Company.

XXIII

That as above alleged, stock in said Sunshine Mining Company is of a highly fluctuating character, and that these

cross-complaining defendants are entitled to a bond in a substantial amount and in excess of \$200,000.00, which said bond will be conditioned so as to guarantee these cross-complaining defendants a price equal to the price at which said stock was selling at the time the restraining order herein was issued.

XXIV

That as hereinbefore referred to and pursuant to the order of the Supreme Court of the State of Idaho directed to the District Court of the First Judicial District, a certain judgment was entered in the above-entitled cause in favor of these cross-complaining defendants and against the defendants John Pelkes and Evelyn H. Treinies for the sum of \$19,429.73, which said judgment was entered on the 18th day of August 1936, and that subsequent to the entry of said judgment as aforesaid by the District Court of the First Judicial District, these cross-complaining defendants caused to be issued an execution on said judgment, and acting pursuant to the terms, conditions and provisions of said writ of execution entered in said action as aforesaid, the [fol. 65] Sheriff of Shoshone County garnisheed the plaintiff, Sunshine Mining Company, and under and by virtue of said writ of execution and said writ of garnishment aforesaid, Sunshine Mining Company was required to pay to the Sheriff of Shoshone County all dividends which had accrued on 701 shares of the capital stock of said plaintiff, Sunshine Mining Company, which said stock, under the decree of the District Court of the First Judicial District, belonged to defendant, Evelyn H. Treinies, and which said dividends had accrued and been payable at all times from and after the 4th day of August, 1934, and that at the present time, as your cross-complaining defendants are informed, and allege the fact to be, the dividends which have accrued on said 701 shares of stock now amount to a sum in excess of \$3,000.00, and that the plaintiff, Sunshine Mining Company, has failed, neglected and refused to pay said sum into the registry of the above entitled court.

XXV

That for the purpose of further satisfying said judgment for \$19,429.73, these cross-complaining defendants further instructed the Sheriff of Shoshone County to execute upon

the 701 shares of capital stock of said corporation, which stock was in the hands of the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and acting pursuant to said writ of execution and pursuant to the instructions of these cross-complaining defendants, the Sheriff of Shoshone County, State of Idaho, on or about the 19th day of August, [fol. 66] 1936, levied upon said certificate for 701 shares of stock and took the same into his possession, and the plaintiff Sunshine Mining Company, in its bill of interpleader has failed to take any action in respect to said 701 shares of stock, which stock these cross-complaining defendants are entitled to have sold and the proceeds applied to the payment of said money judgment as above referred to.

XXVI

That the said defendant Evelyn H. Treinies now is and at all times herein mentioned has been the principal party defendant in said Idaho action hereinabove referred to and is the instigator of said purported proceedings now purported to be pending in the Superior Court of the State of Washington, in and for the County of Yakima, and that as these cross-complaining defendants are informed and therefore allege the fact to be, said defendant Evelyn H. Treinies is execution-proof and that no judgment which is collectible can be procured against said defendant Evelyn H. Treinies.

XXVII

These cross-complaining defendants further allege the fact to be that the plaintiff, Sunshine Mining Company, has wrongfully and unlawfully failed to pay to these cross-complaining defendants the dividends which have accrued on said 15,299 shares of stock, and has unlawfully and wrongfully refused transfer of said certificates to the said defendant Katherine Mason, for the reason that the acts of said plaintiff, Sunshine Mining Company, in superseding [fol. 67] said judgment made by the District Court of the First Judicial District by the deposit of said certificates of stock with knowledge on the part of said plaintiff, Sunshine Mining Company, of the existence of said purported judgment within the State of Washington, would in fact and does constitute the superseding of said Idaho judgment by the deposit of what in fact constitutes tokens of no value

whatsoever or at all. Your cross-complaining defendants allege the fact to be that said plaintiff, Sunshine Mining Company, has estopped itself from questioning the validity of the certificates for 15,299 shares of stock heretofore issued to the cross-complaining defendant Katherine Mason, and has further estopped itself from refusing to pay dividends which have accrued and become payable on said 15,299 shares of stock.

XXVIII

That by reason of the matters and things aforesaid, these cross-complaining defendants allege the fact to be that the plaintiff, Sunshine Mining Company, is not entitled to a temporary restraining order in the above-entitled cause, nor to a restraining order pendente lite as against these answering defendants, and that these answering defendants are entitled to a restraining order pendente lite restraining the remaining defendants other than these cross-complaining defendants from proceeding with said proceeding now pending in the Superior Court of the State of Washington in and for the County of Yakima, and from the institution [fol. 68] or prosecution of any other action as against these cross-complaining defendants in any other court on any of the subject matter involved herein, and that in the event the said restraining order heretofore issued as against these cross-complaining defendants is continued in force and effect as a restraining order pendente lite, the said defendants Evelyn H. Treinies and/or Seattle-First National Bank (Spokane and Eastern Branch), and the said J. C. Cheney, acting as receiver, should be required to give a bond in an amount sufficient to protect the said cross-complaining defendants as against the fluctuation in the value of said stock on the open markets as hereinbefore referred to.

Wherefore, these complaining defendants, having fully answered said bill of interpleader, pray that said plaintiff, Sunshine Mining Company, be instructed to forthwith recognize an assignment of said certificates for 15,299 shares of stock in said Sunshine Mining Company, which stock has heretofore been issued to the said Katherine Mason, and to permit a transfer thereof on the books of said plaintiff corporation, and that the clerk of the above-entitled court be ordered to forthwith pay to these cross-complaining defendants all sums of money heretofore deposited in the

registry of the above-entitled court, and that said Sunshine Mining Company be further instructed to forthwith pay to the Sheriff of Shoshone County, State of Idaho, all dividends [fol. 69] which have accrued on said 701 shares of the capital stock of said corporation standing of record on the books of the corporation in the name of Evelyn H. Treinies since the 4th day of August, 1934, and that upon a sale of said 701 shares of stock in said plaintiff corporation, which stock stands of record in the name of the defendant Evelyn H. Treinies, by the Sheriff of Shoshone County, and upon the issuance of a certificate of sale by the Sheriff of Shoshone County pursuant to a sale to be held under execution, such Sunshine Mining Company, be ordered and directed to recognize the same and to cause a transfer of said certificate to be made to the purchaser at such sale, and that the temporary restraining order heretofore issued as against these cross-complaining defendants be dissolved, or in the alternative and in the event said temporary restraining order is made an order pendente lite, that a bond be required in an amount sufficient to guarantee to these cross-complaining defendants a price equal to the market value of said stock as of the date of the issuance of the temporary restraining order, and that said bond so required be conditioned so as to protect these cross-complaining defendants, said bond to be fixed in an amount sufficient to guarantee said price, taking into consideration the fact that the stock of said corporation is of a highly fluctuating character, and that in the event said stock shall drop to a price where said bond no longer would be ample, the cross-complaining defendants could apply ex parte to the above-entitled court for an order requiring the giving of an additional [fol. 70] bond so conditioned that said temporary restraining order heretofore issued as against the defendants Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch, administrator with the will annexed of the estate of John Pelkes, deceased, J. C. Cheney, as receiver, and A. W. Hawkins, as the duly-elected, qualified and acting judge of the Superior Court of the State of Washington, in and for Yakima County, be continued in full force and effect pending a final hearing hereon, and that upon the final hearing to be had hereon, said restraining order pendente lite as against said defendants above named be made a permanent injunction and restraining order, and that these cross-complaining defendants do have

and recover their costs herein incurred, and for such other and further relief as to the court may seem just and equitable.

Lester S. Harrison, Kellogg, Idaho; Cox and Ware, Lewiston, Idaho; Richard S. Munter, Spokane, Washington; Walter H. Hanson, F. C. Keane, Wallace, Idaho, Solicitors for Answering Defendants and cross-complainants.

[fols. 71-72] (Duly verified.)

[fol. 73] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT J. C. CHENEY AS RECEIVER—Filed
April 8, 1937

Comes now the defendant J. C. Cheney as Receiver, and answering the bill of interpleader filed by the Sunshine Mining Company, a corporation, alleges:

1

This defendant admits paragraph 1, 2 and 3 of the bill of interpleader.

2

Answering paragraphs 4, 5, 6, and 7 of said bill of interpleader, this defendant is without knowledge or information to form a belief and therefore denies each of said paragraphs.

3

Answering paragraphs 8, 9 and 10 of said bill of interpleader, this defendant admits the same and each and every allegation therein contained.

[fol. 74]

4

Answering paragraphs 11, 12, 13, 14, and 15, this defendant denies the same.

5

Answering paragraphs 16, this defendant admits the first two sentences thereof down to and including the word "cause" in line 11 of said paragraph, line numbered 18 on said page. Defendant specifically denies that part of

said paragraph reading as follows: "That subsequently thereafter said Katherine Mason dismissed her said petition," and admits that such proceedings were had in said probate cause which resulted in a decree being entered in said probate cause on the 31st day of May, 1935, wherein it was adjudged and adjudicated that the said John Pelkes was the owner of said 30,598 shares of Sunshine Mining Company stock, which stock is the stock in controversy in this action, the dividends in controversy in this action being the dividends upon said stock. This defendant denies the balance of said paragraph.

6

Answering paragraph 17, defendant admits the same.

7

Answering paragraph 18, this defendant admits the same down to and including the words "Evelyn H. Treinies" on line 19, and in reference to the balance of said paragraph this defendant does not have knowledge or information sufficient to form a belief and therefore denies the same.

8

Answering paragraph 19, this defendant admits the same.

9

Answering paragraph 20, this defendant admits the same down to the word "pending" on line 19 of said page, line 5 of said paragraph, and denies the rest and residue of said paragraph.

[fol. 75]

10

Answering paragraphs 21, 22, 23 of said bill of interpleader, this defendant is without knowledge or information as to the truth or falsity of the matters and things therein set forth and therefore denies the same.

11

Answering paragraph 24, this defendant admits that as the receiver of the Superior Court of the State of Washington in and for Spokane and Yakima Counties in that certain cause entitled "Seattle First National Bank (Spo-

kane and Eastern Branch) as administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies, plaintiffs, vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane, and Sunshine Mining Company, defendants" being Cause No. 29435 in the Superior Court for Yakima County and Cause No. 98427 in the Superior Court for Spokane County, he claims the right to the possession and control of the stock mentioned in the bill of interpleader and all of the dividends referred to in said bill of interpleader, subject to and in pursuance of the orders of said courts. That attached to this answer, marked Exhibit "A", is the order under and by virtue of which this defendant qualified and was appointed as such receiver, and by reference the same is made a part of this answer, and incorporated herein. Defendant further alleges that the propriety of said appointment is now under advisement by the Honorable A. W. Hawkins, Judge of said Court, in pursuance of stipulation and agreement made by counsel for the plaintiffs and the appearing defendants in that action and in pursuance of the regular process and procedure of said court. That as to the rest and residue of the allegations contained in said paragraph 24 this defendant has no knowledge or information and [fol. 76] therefore denies the same.

12

Answering paragraphs 26, 27 and 25, this defendant is without knowledge or information with reference thereto and therefore denies the same.

Further Answering Said Bill of Interpleader and by way of Affirmative Defense, this defendant alleges:

1

That the Superior Courts of the State of Washington are courts of general jurisdiction.

2

That your defendant was appointed receiver of the shares of stock and dividends referred to and mentioned in the bill of interpleader in that certain action now pending before said court sitting in Yakima County in an action en-

titled, "Seattle First National Bank, Spokane and Eastern Branch, administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies, plaintiffs, vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane, and Sunshine Mining Company, defendants," being cause No. 29435 of the Superior Court in and for Yakima County. That as such receiver your defendant served a certified copy of the order appointing him receiver upon said Sunshine Mining Company and endorsed upon the records of said Sunshine Mining Company the taking of possession of said stock and dividends, and said mining company covenanted and agreed not to disburse any dividends to anyone until further order of the Superior Court of the State of Washington, and by such action took into his possession as such receiver said shares in the Sunshine Mining Company and said dividends.

[fol. 77]

3

That the Sunshine Mining Company is a corporation organized under the laws of the state of Washington with its principal place of business at Yakima, Yakima County, Washington, and maintains a transfer office at said place. That all dividends are payable at Yakima, Washington, and the funds of said mining company are kept at Yakima, Washington, and said dividends, if any, are payable from such funds so located at Yakima, Washington.

4

That the Superior Court of the State of Washington has full and complete jurisdiction of said Sunshine Mining Company, first, by virtue of its residence, second, by virtue of personal service upon it within the state of Washington, and third, by virtue of its general appearance in said action. That said Superior Court of the State of Washington has jurisdiction of all of the other defendants by reason of personal service upon them either within the state of Washington or within the state of Idaho, and such service within the state of Idaho is tantamount under the laws of the state of Washington to service by publication and makes such defendants subject to the jurisdiction of said court in so far as any interest in such stock or dividends.

5

But this answering defendant is wholly subject to the order of the Superior Court of the State of Washington whose officer he is, and alleges that no order should be entered by this court in any way subjecting this defendant to conflicting orders from different courts of coordinate jurisdiction.

6

This defendant adopts the answer of the defendant A. W. Hawkins as his answer in these proceedings.

[fol. 78] Wherefore, this defendant prays that this court enter such order or orders as may be meet and proper under the circumstances and that any order entered in reference to this defendant be made similar and identical to any order in reference to the defendant A. W. Hawkins.

Joseph C. Cheney, as Receiver in His Own Proper Person.

[fol. 79] EXHIBIT "A" TO ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR
SPOKANE COUNTY

No. 98,427

JOHN PELKES and EVELYN H. TREINIES, Plaintiffs,

v.

KATHERINE MASON, T. R. MASON, LESTER S. HARRISON,
Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson,
F. C. Keane, and Sunshine Mining Company, Defendants

ORDER APPOINTING RECEIVER

This matter having come regularly on for hearing on the motion of Evelyn H. Treinies, one of the plaintiffs in the above entitled action, for the appointment of a temporary receiver, the court having heard said motion and being fully advised in the premises,

It is Ordered, Adjudged and Decreed that Joseph Cheney, Esquire, be and he hereby is appointed a temporary receiver to take into his possession as such the undi-

vided interest in the assets of the Sunshine Mining Company, of which Certificate No. 1755-A heretofore issued by the said Sunshine Mining Company is the indicia of ownership, and which said interest may be deemed to be affected by certain other certificates issued by the Sunshine Mining Company to Katherine Mason in the aggregate amount of 16,000 shares, and also of any accrued dividends which may now be in the possession of the Sunshine Mining Company and payable to the owner of the undivided interest heretofore referred to.

It is Further Ordered that the said receiver shall reduce the said undivided interest to his possession by presenting a certified copy of this order to the officers of the [fol. 80] Sunshine Mining Company, and further by endorsing on the proper transfer books thereof on the stub from which Certificate No. 1755-A was removed and also on the stubs from which the aforesaid certificates issued to Katherine Mason were removed the fact that the interests which may be evidenced by them, or any portion thereof, are in his possession as receiver of this court. In the event that the transfer books of said Sunshine Mining Company are not in the State of Washington, or are not available to the receiver for such endorsement, he is hereby directed to make a presentation of this order as above provided to the officers of the Sunshine Mining Company and such presentation shall be effective to reduce to the possession of the said receiver the interests above described.

This order shall be effective immediately upon a bond in the sum of \$1,000 issued by a surety company doing business within this state, being posted in behalf of the said receiver so designated, and upon his affirming on oath that he will perform his duties as receiver faithfully. Because of the existence of an emergency the said receiver shall qualify immediately upon executing such oath under seal and may thereupon forward such oath so executed to the clerk of this court for entry herein.

It is Further Ordered that during the pendency of this receivership the Sunshine Mining Company, Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, and F. C. Keane be and they are hereby restrained from taking into their possession or transferring or in any way dealing in the undivided interest in the assets of the Sunshine Mining

Company referred to above, or in dividends upon such in-[fol. 81] terest which may be in their possession.

It is Further Ordered that the said Evelyn H. Treinies shall serve a copy of this order on Richard S. Munter, Esquire, in behalf of defendants Walter H. Hanson and Jane Doe Hanson, and upon Messrs. Rigg, Brown & Halverson in behalf of the defendant Sunshine Mining Company forthwith, and that those parties or the others above named shall show cause on the 27th day of January, 1937, if any they have, why the receiver above named shall not retain the property above described in his possession pendente lite, and why they shall not be restrained from the dealings described in the preceding paragraph in such property or dividends pending this litigation.

Done in Open Court this 11th day of January, 1937.

Wm. A. Huneke, Judge.

Presented by Paul H. Graves.

[fol. 82] IN UNITED STATES DISTRICT COURT

ANSWER, REPLY AND CROSS-COMPLAINT OF DEFENDANTS
EVELYN H. TREINIES AND SEATTLE-FIRST NATIONAL BANK
(SPOKANE & EASTERN BRANCH), ADMINISTRATOR WITH THE
WILL ANNEXED OF THE ESTATE OF JOHN PELKES, DE-
CEASED—Filed April 26, 1937

Come now the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane & Eastern Branch), Administrator with the will annexed of the estate of John Pelkes, deceased, and by way of answer to the bill of interpleader filed herein, admit and deny as follows:

1. They admit all the allegations contained in paragraph 1 thereof.
2. They admit all the allegations contained in paragraph 2 thereof.
3. They admit all the allegations contained in paragraph 3 thereof.
4. They admit all the allegations contained in paragraph 4 thereof.
5. In answer to the allegations contained in paragraph 5 thereof, they admit that at all times herein mentioned Lester

S. Harrison and Grace G. Harrison were and now are husband and wife, but deny they are citizens of the State of Idaho and reside at Kellogg, County of Shoshone, State of Idaho.

6. They admit all the allegations contained in paragraph 6 thereof.

7. They admit all the allegations contained in paragraph 7 thereof.

8. They admit all the allegations contained in paragraph 8 thereof.

[fol. 83] 9. They admit all the allegations contained in paragraph 9 thereof.

10. They admit all the allegations contained in paragraph 10 thereof.

11. In answer to the allegations contained in paragraph 11 thereof, they admit that on or about the 4th day of August, 1934, defendants Katherine Mason and T. R. Mason, as plaintiffs, instituted suit in the District Court of the First Judicial District of the state of Idaho, in and for the county of Shoshone, against John Pelkes, Frances Thinnes and Pierre Thinnes, her husband, Evelyn H. Treinies, and Sunshine Mining Company, a corporation, being cause No. 7460 of the records and files of the office of the Clerk of said Court in the city of Wallace, state of Idaho; that certain allegations were made by the plaintiffs therein; that Frances Thinnes and Pierre Thinnes were dismissed from the said proceeding prior to decree therein; that a decree was entered therein; and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

12. In answer to the allegations contained in paragraph 12 thereof, they admit that John Pelkes, now deceased, and Evelyn H. Treinies and the Sunshine Mining Company appealed to the Supreme Court of the State of Idaho; that Katherine Mason and T. R. Mason cross-appealed; and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

13. In answer to the allegations contained in paragraph [fol. 84] 13 thereof, they admit an opinion was handed down in said cause by the Supreme Court of the State of Idaho, and deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

14. In answer to the allegations contained in paragraph 14 thereof, they deny each and every matter and thing therein contained.

15. In answer to the allegations contained in paragraph 15 thereof, they admit that thereafter John Pelkes and Evelyn H. Treinies made application to the Supreme Court of the United States for writ of certiorari to review the decision of the said Idaho Supreme Court and obtained an injunction restraining Katherine Mason from transferring any of the purported certificates of stock which she might have in her possession, or disposing of any sum of money which might have been paid to her as dividends on such purported shares of stock, and that the Supreme Court of the United States denied such application, and they deny each and every other matter and thing therein set out.

16. In answer to the allegations contained in paragraph 16 thereof, they admit that while the cause therein referred to purported to be pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and before any trial purported to have been held therein, that on or about the 14th day of December, 1934, defendant herein Katherine Mason filed a petition "In the matter of the estate of Amelia Pelkes, deceased" in the Superior Court of the State of Washington for Spokane [fol. 85] County, being cause No. 15,496 of the probate files and records of said court; that in the said petition Katherine Mason prayed for relief; that John Pelkes filed a return, cross-petition and other petitions therein; that decree was rendered in said probate court on the 31st day of May, 1935, wherein it was adjudicated, among other matters, that John Pelkes was the owner of 30,598 shares of Sunshine Mining Company stock, and admit that the said John Pelkes and those claiming under him, there admit that the existence of those proceedings and the entry of that decree were relied upon as a defense for the reason and upon the ground that

on account thereof the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and the Supreme Court of the State of Idaho had no jurisdiction of the cause above referred to which then purported to be pending before them and they deny each and every other matter and thing therein contained, except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

17. In answer to the allegations contained in paragraph 17 thereof, they admit John Pelkes, now deceased, and Evelyn H. Treinies, as plaintiffs, instituted in the Superior Court of the State of Washington for Spokane County a suit against Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and the Sunshine Mining Company, wherein said plaintiffs allege they are the owners of all of said 16,000 shares of stock of the Sunshine Mining Company, and further alleged that the defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson and F. C. Keane claimed to have some interest in said stock and prayed that title of said plaintiffs in said 16,000 shares of stock be quieted as to said [fol. 86] plaintiffs, and while said cause was pending, on the 16th day of October, 1936, said John Pelkes died and said Seattle-First National Bank (Spokane & Eastern Branch) was appointed as administrator with the will annexed of the estate of John Pelkes, deceased, and substituted as party plaintiff in said cause, and deny each and every other matter and thing therein contained, except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

18. In answer to the allegations contained in paragraph 18 thereof, they admit that on or about the 11th day of January, 1937, the Supreme Court of the United States denied application for writ of certiorari to review the decision of the Supreme Court of Idaho, and on or about said date order was entered in said case pending in the Superior Court of the State of Washington for Spokane County, appointing J. C. Cheney as temporary receiver to take over the undivided interest in the assets of the Sunshine Mining Company which is evidenced by the certificate of stock held by Evelyn H. Treinies, and also purports to be evidenced by certificates

of stock held by defendant Katherine Mason; that the said J. C. Cheney duly qualified as such receiver and took into his possession such interest, and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

19. In answer to the allegations contained in paragraph 19 thereof, they admit that thereafter, on or about the 19th day of January, 1937, said Seattle-First National Bank (Spokane & Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn [fol. 87] H. Treinies filed in the said cause in the Superior Court of the State of Washington for Spokane County, being cause No. 98,427, their amended complaint, and thereafter such proceedings were had that said cause was transferred from the Superior Court of the State of Washington for Spokane County to the Superior Court of the State of Washington for Yakima County; that motions and demurrers have been made by the defendant Sunshine Mining Company and by the defendants Walter H. Hanson and Jane Doe Hanson to said amended complaint and that these motions and demurrers have been argued before the Honorable A. W. Hawkins; that the matter was under advisement before him as Judge of the Superior Court of the State of Washington for Yakima County, at the time of filing of said bill of interpleader in this court.

20. In answer to the allegations contained in paragraph 20 thereof, they admit that the principal place of business of the said Sunshine Mining Company is located at Yakima; that said Sunshine Mining Company is subject to the jurisdiction of the Superior Court of the State of Washington for Yakima County in the cause above referred to; that it is a foreign corporation doing business in the state of Idaho with certain of its mining properties within Shoshone County, Idaho, and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

21. In answer to the allegations contained in paragraph 21 thereof, they admit the Sunshine Mining Company does not claim and has not claimed any interest in the 16,000 [fol. 88] shares of capital stock or dividends accrued or ac-

cruing thereon as therein referred to; that defendant has paid into the registry of the above entitled court \$19,123.75; and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

22. In answer to the allegations contained in paragraph 22 thereof, they deny each and every matter and thing therein contained.

23. In answer to the allegations contained in paragraph 23 thereof, they admit that defendants Seattle-First National Bank (Spokane & Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies did assert and are asserting that the decree of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, as modified by the Supreme Court of the State of Idaho, is null and void and have demanded that the Sunshine Mining Company recognize their ownership in said stock and dividends accrued and accruing thereon and pay the dividends to them immediately; that in the event of their failure so to do the Sunshine Mining Company will be held liable for damages and suit for recovery thereof; and further admit in the case now pending in Yakima County they have caused a restraining order to be served upon the Sunshine Mining Company to cause the company to refrain from transferring any stock during the pendency of such action; and they deny each and every other matter [fol. 89] and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

24. In answer to the allegations contained in paragraph 24 thereof, they admit that defendants therein named claimed to have some interest in the said stock and the dividends accrued and accruing thereon, and deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

25. In answer to the allegations contained in paragraph 25 thereof, they admit that decrees of the state courts, namely the decree of the Idaho Supreme Court and the de-

cree of the Washington court, purport to establish conflicting rights of ownership in the stock and dividends accrued and accruing thereon; that said decrees result from separate actions instituted in separate states by the defendant Katherine Mason, and they deny each and every other matter and thing therein contained.

26. In answer to the allegations contained in paragraph 26 thereof, they admit that the case now pending in the Superior Court of the State of Washington for Yakima County is under advisement by defendant A. W. Hawkins as judge thereof, and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

[fol. 90] Come now the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane & Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and by way of answer and reply to the so-called "Further Answer to the Bill of Interpleader and Cross-Complaint" contained in the answer and reply of defendants Katherine Mason and T. R. Mason, wife and husband; Lester S. Harrison and Grace G. Harrison, husband and wife; Walter H. Hanson and Jane Doe Hanson, husband and wife; and F. C. Keane, admit and deny as follows:

1. In answer to the allegations contained in paragraph I thereof, they admit that the Sunshine Mining Company has been and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and they deny each and every other matter and thing therein contained.

2. They admit all the allegations contained in paragraph II thereof.

3. They admit all the allegations contained in paragraph III thereof.

4. In answer to the allegations contained in paragraph IV thereof, they admit that defendants Lester S. Harrison, Walter H. Hanson and F. C. Keane now are and at all times therein mentioned have been duly licensed and practicing attorneys at law in the state of Idaho, and they deny each and every other matter and thing therein contained.

5. In answer to the allegations contained in paragraph V, they admit, that on to wit the 4th day of August, 1934 [fol. 91] Katherine Mason and T. R. Mason instituted a certain action in which the defendants therein named were named as parties defendant, and deny each and every other matter and thing therein contained.

6. In answer to the allegations contained in paragraph VI, they admit the stock therein referred to was in the possession and under the control and domination of the defendant therein named, Evelyn H. Treinies, at the time of instituting the action therein referred to, and they deny each and every other matter and thing therein contained.

7. In answer to the allegations contained in paragraph VII, they admit that the said John Pelkes and Evelyn H. Treinies alleged in the action pending in the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone, that the said John Pelkes and Evelyn H. Treinies had entered into an agreement with reference to the stock therein referred to by which the said John Pelkes had agreed to transfer the said stock to the said Evelyn H. Treinies in consideration of her agreement to support him during the remainder of his life, and they deny each and every other matter and thing therein contained.

8. In answer to the allegations contained in paragraph VIII thereof, they deny each and every matter and thing therein contained.

9. In answer to the allegations contained in paragraph IX thereof, they admit defendant John Pelkes called to the attention of the District Court of the First Judicial District [fol. 92] of the State of Idaho, in and for the county of Shoshone, the decree of the Superior Court of the State of Washington for Spokane County, entered in a proceeding entitled "In the Matter of the Estate of Amelia Pelkes, Deceased"; that said decree was a final judgment and decree, and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

10. In answer to the allegations contained in paragraph X, they deny each and every matter and thing therein contained.

11. In answer to the allegations contained in paragraph XI, they admit that Evelyn H. Treinies did not appear at the trial of the action therein referred to, and they deny each and every other matter and thing therein contained.

12. In answer to the allegations contained in paragraph XII, they deny each and every matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

13. In answer to the allegations contained in paragraph XIII thereof, they admit that appeals were taken to the Supreme Court of the State of Idaho by defendants John Pelkes and Evelyn H. Treinies, and by defendant Sunshine Mining Company, and that said Sunshine Mining Company had full knowledge of the existence of the judgment of the [fol. 93] Superior Court of the State of Washington in and for Spokane County "In the Matter of the Estate of Amelia Pelkes, Deceased" which has been above referred to, and that John Pelkes and Evelyn H. Treinies relied thereon, and deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

14. In answer to the allegations contained in the second paragraph designated as paragraph XIII, they deny each and every matter and thing therein contained.

15. In answer to the allegations contained in paragraph XIV, they deny each and every matter and thing therein contained.

16. In answer to the allegations contained in paragraph XV, they admit that the Supreme Court of the State of Idaho entered its opinion and what purported to be its final judgment in which the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, was ordered and directed to modify its purported decree theretofore entered, and they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

[fol. 94] 17. In answer to the allegations contained in paragraph XVI, they admit the court referred to a certain re-

straining order which purported to be entered in the Idaho litigation at a time not specified in said paragraph, and they deny each and every other matter and thing therein contained.

18. In answer to the allegations contained in paragraph XVII, they admit defendants Pelkes and Treinies commenced the action referred to in the bill of interpleader and that said action is now pending in the Superior Court of the State of Washington for Yakima County, and they admit the purported decrees therein referred to undertook to enjoin and restrain these defendants from instituting certain proceedings, and they deny each and every other matter and thing therein contained.

19. In answer to the allegations contained in paragraph XVIII, they state they do not have sufficient knowledge to form a belief as to the truth thereof and therefore deny each and every matter and thing therein contained.

20. In answer to the allegations contained in paragraph XIX, they admit that the defendants therein named applied to the Supreme Court of the United States for a writ of certiorari and procured a restraining order restraining the named defendants from disposing of the stock involved in this litigation and the dividends thereon, and further allege that they do not have sufficient information to form a belief as to the truth of the remaining allegations therein contained and therefore deny the same.

21. In answer to the allegations contained in paragraph [fol. 95] XX, they admit the Supreme Court of the United States refused to grant the application for certiorari of the defendants Pelkes and Treinies, and that the said John Pelkes died while said matter was pending in the Supreme Court of the United States and that these defendants filed an amended complaint in the courts of the State of Washington in which they secured the appointment of one J. C. Cheney as receiver, and they deny each — every other matter and thing therein contained.

22. In answer to the allegations contained in paragraph XXII, they deny each and every matter and thing therein contained.

23. In answer to the allegations contained in paragraph XXII, they admit that the stock of the Sunshine Mining

Company has had a ready sale for around \$21 a share and around \$19 a share, and they deny each and every other matter and thing therein contained.

24. In answer to the allegations contained in paragraph XXIII, they deny each and every matter and thing therein contained.

25. In answer to the allegations contained in paragraph XXIV, they deny each and every other matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and cross-bill of these defendants.

26. In answer to the allegations contained in paragraph XXV, they deny each and every matter and thing therein contained except in so far as these allegations are hereinafter expressly admitted in the affirmative answer and [fol. 96] cross-bill of these defendants.

27. In answer to the allegations contained in paragraph XXVI, they deny each and every matter and thing therein contained.

28. In answer to the allegations contained in paragraph XXVII, they state they do not have sufficient knowledge to form a belief as to the truth thereof and therefore deny each and every matter and thing therein contained.

29. In answer to the allegations contained in paragraph XXVII, they deny each and every matter and thing therein contained.

Come now the defendants Seattle-First National Bank (Spokane & Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies and by way of affirmative answer to the bill of interpleader filed herein, and by way of affirmative answer to the answer and reply of defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Jane Doe Hanson, husband and wife, and F. C. Keane, and also by way of cross-complaint against the plaintiff Sunshine Mining Company and the defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Jane Doe Hanson, husband and wife, and F. C. Keane, allege:

1. At all times herein mentioned the defendant Seattle-First National Bank (Spokane & Eastern Branch) was a [fol. 97] corporation organized and existing under the national banking laws of the United States, authorized to do business in the state of Washington and carrying on a general banking and trust business in the city of Spokane in said state. On the 16th day of October, 1936, John Pelkes died testate, a resident of Spokane County in the state of Washington, and at all times subsequent to the 28th day of December 1936, it was and now is the duly qualified and acting administrator with the will annexed of the estate of John Pelkes, deceased.

2. At all times herein mentioned the plaintiff Sunshine Mining Company was and it now is a corporation organized and existing under and pursuant to the laws of the state of Washington and had and has its principal place of business in the city of Yakima, county of Yakima, in the same state.

3. At all times herein mentioned the Superior Courts of the state of Washington were and they now are courts of record having original and general jurisdiction of all civil causes involving more than \$100, arising within the territorial limits of the state, both legal and equitable, and they exercise these powers and enjoy this jurisdiction when sitting in probate.

The constitution and laws of the State of Washington provide:

“Jurisdiction of Superior Courts.—The Superior Court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars and in all criminal cases [fol. 98] amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which

jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. * * *

Section 6, Article IV, Constitution of Washington.

“The Superior Court shall have original jurisdiction
* * * of all matters of probate. * * *

2 Rem. Rev. Stat., Section 15.

“The Superior Courts in the exercise of their jurisdiction of matters of probate shall have power to probate or refuse to probate wills, appoint administrators, executors and guardians of insane and incompetent persons and minors and administer and settle all such estates, award processes and cause to come before them all persons whom they may deem it necessary to examine, and order and cause to be issued all such writs as may be proper or necessary, and to do all things proper or incident to the exercise of such jurisdiction.”

2 Rem. Rev. Stat., Section 1371.

“Jurisdiction of Courts—Powers when Law Inapplicable.—It is the intention of this act that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. If the provisions of this (act) with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled.”

3 Rem. Rev. Stat., Section 1589.

“Venue.—Wills shall be proved and letters testamentary or of administration shall be granted:

1. In the county of which deceased was a resident or had his place of abode at the time of his death.

2. In the county in which he may have died, or in which any part of his estate may be, he not being a resident of the state.

[fol. 99] 3. In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death.

3 Rem. Rev. Stat., Section 1376.

“* * * Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.”

3 Rem. Rev. Stat., Section 1533.

“* * * The court shall have authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable, except upon a hearing before the court and upon the testimony of at least three disinterested witnesses previously appointed by the court for the purpose of viewing such property to be partitioned or sold. The court shall fix the values of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the proceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable.

“The provisions of this section shall be concurrent with and not in derogation of other existing statutes as to partition of property.”

3 Rem. Rev. Stat., Section 1533.

The situs of stock in a corporation organized and existing under the laws of the State of Washington is in the state of Washington and upon the death of the owner administration must be had within the state.

“The laws of the State of Washington provide:

“The stock of the company (i. e., any corporation organized under the laws of the State of Washington) shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the

parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of transfer."

Rem. Rev. Stat., Section 3819.

"The sheriff to whom the writ (of attachment) is directed and delivered must execute the same without delay as follows: * * *

[fol. 100] "Stock or shares, or interest in stock or shares, of any corporation, association, or company, shall be attached by leaving with the president or other head of the same, or the secretary, cashier or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ."

Rem. Rev. Stat., Section 659.

"Before the issuance of the writ of garnishment the plaintiff * * * shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that * * * the garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company or has an interest therein * * *."

Rem. Rev. Stat., Section 682.

"From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects, nor shall the garnishee if an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment, delivery, sale or transfer shall be void and of no effect as to so much of said debt, effects, shares, or interest as may be necessary to satisfy the plaintiff's demand."

Rem. Rev. Stat., Section 688.

"Where the garnishee is an incorporated or joint stock company, and it appears by the answer or otherwise that the defendant is or was, when the writ of garnishment was served, the owner of any shares of stock in such company or any interest therein, the court shall render a decree ordering the sale under execution in favor of the plaintiff,

against the defendant, of such shares or interest of the defendant in such company, or so much thereof as may be necessary to satisfy such execution."

Rem. Rev. Stat., Section 697.

"The sale so ordered shall be conducted in all respects as other sales of personal property under execution, and the sheriff making such sales shall execute a transfer of such shares or interest to the purchaser with a brief recital of the judgment of the court under which the same was sold."

Rem. Rev. Stat., Section 698.

"Such sale shall be valid and effectual to pass to the purchaser all the right, title and interest which the defendant had in such shares of stock, or in such company, and the proper officers of such company shall enter such sale [fol. 101] and transfer on the books of the company in the same manner as if the sale had been made by the defendant himself."

Rem. Rev. Stat., Section 699.

Under the laws of the State of Washington, as established by its statutes and the decisions of the Supreme Court, the highest court of that state, the Superior Court of the state sitting in probate has jurisdiction to inquire into, approve and ratify and refuse to approve and ratify all partition agreements entered into between the heirs of estates being probated, either before or after the entry of a decree of distribution. It is against the public policy of the State of Washington to permit heirs to withhold from administration and probate property of an estate which is in the course of probate and upon the discovery of assets which have been withheld from probate, it is the duty of the Superior Court sitting in probate to administer upon those assets to the same extent and in the same manner as the other assets of the estate. The inclusion of a residuary clause in a decree of distribution would not deprive that court of jurisdiction in the particular estate to administer upon assets which had not been inventoried or called to its attention prior to the entry of a decree. After the entry of a decree of distribution that court retains jurisdiction to inquire whether the executor has delivered the assets of the estate as required by law, and to hear and determine

the validity of any reasons he may offer for departing from the strict letter of the law in distributing the estate.

[fol. 102] It is the law of the state of Washington, under the circumstances hereinafter set out with reference to the estate of Amelia Pelkes, that the Superior Court of the State of Washington for Spokane County, upon the institution of proceedings to probate her will, was possessed of exclusive jurisdiction over the proceedings in the matter of her estate until it was finally closed by approval of the receipts of beneficiaries and the making of an order of final discharge of the executor. Under the laws of the state, the administration of an estate is not completed with the entry of a decree of distribution, nor with the distribution thereunder, or purporting to be thereunder. Under those laws it is essential to the closing of an estate that the receipts of the distributees be filed, examined and approved by the court, and an order made closing the estate and discharging the executor or administrator. Where by an agreement between executor or administrator, of the one part, and beneficiaries or distributees, of the other part, a distribution is made on other terms or in another manner than those fixed by the will or decree of distribution, such substituted distribution must be submitted to and approved by the court in which the estate is pending, and such court has power to accept, reject or modify the terms or method of settlement agreed upon as justice may require.

[fol. 103] 5. For many years prior to the 24th day of April 1922, John Pelkes and Amelia Pelkes were residents of Spokane County, Washington; during their married life they had acquired real estate in Spokane County and also acquired stocks and bonds of various corporations organized under the laws of the State of Washington as well as those foreign thereto. Among those assets were 30,598 shares of the capital stock of the Sunshine Mining Company, a Washington corporation, which they held as community property and which is the identical block of stock referred to by the plaintiff in its bill of interpleader.

On that date Amelia Pelkes died testate in Spokane County. Her heirs were John Pelkes, her husband, and Katherine Mason, her daughter by an earlier marriage. Her will divided her estate equally between them and appointed John Pelkes executor. It was admitted to probate and he was regularly appointed executor by order of the Superior

Court of the State of Washington for Spokane County. This cause is entitled "In the Matter of the Estate of Amelia Pelkes, Deceased", being No. 15,496 on the probate docket of the said court.

The administration of that estate remained open and pending from the date of his appointment, on to wit the 27th day of April 1922, until his discharge on the 31st day of May, 1935.

The inventory filed by the said John Pelkes as executor of the said estate failed to make any reference to the Sunshine stock above referred to, as did a decree of distribution which was entered by the said court on the 9th day [fol. 104] of August, 1923. No steps were thereafter taken to close the estate, no receipts were filed by the heir or executor, no order discharging the executor was entered, and the matter remained in this condition until the 19th day of December 1934, when for the first time reference was made to the Sunshine stock in these proceedings.

On that date the defendant Katherine Mason filed her petition in the said court and therein alleged:

"* * * That * * * no proceedings were ever had or have been had to finally close said estate and that said executor has never received a discharge nor filed any receipts from your petitioner for her distributive share of said estate. * * *

"That * * * the said Amelia Pelkes, now deceased, and the said John Pelkes during their lifetime acquired 30,598 shares of the capital stock of the Sunshine Mining Company, a Washington corporation * * *."

"That none of said property as above mentioned has ever been inventoried nor has probate of said property or any of it ever been had, and that said property as aforesaid and all of it was an asset belonging to the estate of said Amelia Pelkes, deceased, and subject to probate in the above entitled court and proceeding.

* * * * *

"That under the terms of said will aforesaid, your petitioner is entitled to have distributed to her an interest in each and all of the property and effects as hereinbefore particularly described and that it is necessary that in order to complete the probate of said estate aforesaid, that

some competent person be appointed as the administrator with the will annexed of said estate. * * *

"Wherefore, your petitioner prays that a citation issue to the above named John Pelkes, requiring him to show cause at a time and place to be fixed by the court * * * why said property as above described, as well as and together with all other property which has at any time come into his hands as such executor, should not be delivered over to the administrator with the will annexed to be appointed by this court * * * and that he be required to fully account to this court and to his successor herein for everything belonging to said estate which he now has or which he ever has had belonging to the estate.

[fol. 105] "Your petitioner further prays for such other and further relief as to the court may seem meet, just and equitable."

Along with the above quoted matter petitioner averred John Pelkes was guilty of misconduct that required his removal as executor and prayed he might be removed and her nominee, one C. Harold Easter, appointed as administrator with the will annexed. With her petition was filed one by C. Harold Easter in which he averred:

"* * * That your petitioner is advised and believes and therefore states it to be a fact that no proceedings were ever had or have been had to finally close said estate and that said executor has never received a discharge nor filed any receipts from the persons entitled to distributive interests under said will and the said estate is subject and should be further administered upon. * * *"

Both petitions were signed by Katherine Mason and by the defendants Harrison and Hanson as her attorneys.

Based on the foregoing petitions an order of citation was entered in the said proceedings, directing the said executor to appear before the court "to show cause why * * * he should not forthwith account to this court and to his successor to be appointed by this court for all money and property of every kind, nature and description, which he now has or which has ever come into his hands as such executor belonging to this estate * * *". A citation issued pursuant to this order contained identical recitals.

The Mason and Easter petitions were called to the attention of W. H. Pemberton as Supervisor of the Inherit-

ance Tax and Escheat Division of the State of Washington who thereupon in that capacity filed in the same probate proceedings his petition which among other things recited:

[fol. 106] " * * * the State of Washington, by William H. Pemberton, Supervisor of the Inheritance Tax and Escheat Division thereof, being an interested party in said proceedings by reason of an inheritance tax due to the State of Washington on said omitted property, * * * comes now and petitions this Honorable Court for an order revoking letters testamentary heretofore issued to John Pelkes in the above-entitled estate * * * ; that an inventory and appraisement was filed in said estate wherein certain properties were set out over the signature of said John Pelkes, executor, as being a true inventory of all the real estate and all the goods, chattels, rights and credits of Amelia Pelkes, deceased, coming into the possession or knowledge of the said John Pelkes, and that upon said inventory and appraised value of said estate an inheritance tax was paid to the State of Washington; that said inventory did not contain all of the assets of the estate of Amelia Pelkes, deceased, * * * in that said inventory failed to include * * * 30,598 shares of the stock of the Sunshine Mining Company * * * ; the said omitted items then had and ever since have had a substantial value and there is due to the State of Washington an inheritance tax thereon in the substantial amount which is delinquent and subject to interest at 8% per annum from April 24, 1924, until paid; * * * that said John Pelkes should be required to make a full, true and complete account of his acts as such executor; that appraisers should be appointed in the manner provided by law to appraise the omitted assets of the estate of Amelia Pelkes, deceased, for the purpose of placing a valuation thereon for inheritance tax purposes to the end that the inheritance tax due the State of Washington from the above-entitled estate be finally computed and paid."

This petition concluded with the prayer:

" * * * that your petitioner be granted such other and further relief in the premises as to this Honorable Court seems fit and proper".

In the return which Pelkes filed to the foregoing petitions, he admitted that he had failed to inventory or in any

other manner call the Sunshine stock above referred to to the attention of the court, and further admitted that it had jurisdiction to continue administration upon the estate and he later admitted that an inheritance tax was due to the State of Washington. Included in the said return was a cross-petition, in which he alleged that he had omitted [fol. 107] the stock of the Sunshine Mining Company with the consent of Katherine Mason because both he and she felt it was valueless, and in which he further alleged:

"Thereafter the administration of the property of the above entitled estate proceeded in an orderly manner and respondent in due time and manner filed his final account and petition for distribution, whereupon an order of distribution was entered pursuant to the terms of the will of Amelia Pelkes. After the entry of the said order of distribution respondent discussed a settlement with Katherine Mason of their interest. At that time he voluntarily offered to give her an additional interest in the estate over and above the amount that she was entitled to by the will and by the said order of distribution. At the time and at the specific instance and request of the said Katherine Mason he also agreed to pay her her share in cash or by transferring to her certain choses in action from which money could be readily realized, and at her specific instance and request he retained all of the mining stocks above referred to, together with certain real estate that both he and she anticipated would be difficult to dispose of, and thereafter respondent fully performed all the terms of this settlement.

" * * * respondent is ignorant of the law and did not know it was necessary for him to take a receipt from Katherine Mason for the amount which she had received. He did not know it was necessary for him to be discharged and released from further liability as executor herein. He believed at that time, and continued to believe until recently advised by counsel, that the estate had been completely administered on and had been closed so soon as he had paid all the debts thereof, and had made distribution of the estate according to the order of distribution entered by this court. Respondent is now desirous that the said Katherine Mason be required to file herein her receipt for the portion of the estate of Amelia Pelkes which she has heretofore received, and is also desirous that an order be entered releasing him and discharging him from all lia-

bility in connection herewith, and from further obligation to act as executor herein."

He referred to the litigation which was then pending in Idaho and which is the identical litigation referred to in the bill of interpleader filed herein and called the court's [fol. 108] attention to the fact that Katherine Mason had therein alleged:

"That thereafter and subsequent to the 24th day of April 1922, such proceedings were had that the estate of said Amelia Pelkes was probated in the Superior Court of Spokane County, State of Washington, the place of the decedent's domicile at the time of her death, and that a settlement of all of the assets belonging to said estate was had between the parties entitled thereto, to-wit, the defendant John Pelkes and the plaintiff Katherine Mason, and that under the terms of such settlement as so had between said parties, each of said parties became the owner of a one-half interest in and to the said 30,598 shares of said defendant Sunshine Mining Company's capital stock
* * *"

He denied the truth of these allegations made by Katherine Mason in the Idaho litigation, but asserted that under the partition agreement she had divested herself of her entire interest in said Sunshine stock by taking in lieu of such interest other property having then a ready cash value and with reference to this partition agreement averred:

"* * * Such agreement for settlement and distribution was the only agreement with respect to the property of the estate which was entered into between respondent and Katherine Mason, and such agreement was as alleged herein and not as falsely alleged in the complaint in the Idaho action."

He thereafter alleged:

"Through inadvertence and mistake no receipts showing a distribution of the property of the estate of Amelia Pelkes were ever taken and no order finally discharging respondent as the executor of said estate was ever made. Respondent is informed that because no receipt was taken or order of discharge made the probate proceeding still is pending in this court. By virtue thereof, this court is the

court of primary jurisdiction in all matters connected with the estate of Amelia Pelkes and the distribution of property under either the terms of her will or an agreement for distribution *voluntarily entered into between the distributees*. The shares of stock of the Sunshine Mining Company, the subject matter of the Idaho litigation, are the sole incentive for Katherine Mason's petition in this proceeding, and the only property of the estate of Amelia Pelkes which [fol. 109] is in controversy between respondent and Katherine Mason. Respondent alleges that so far as concerns that stock, there has been an agreement of settlement which has been fully performed and by which Katherine Mason has received all that is her due. If respondent shall not be able to establish the settlement pleaded, then he must account to her for the stock in accordance with the will of Amelia Pelkes. In any event is he amenable to the process of this court and to such order as it may make in the matter of the estate of Amelia Pelkes, deceased, not only for the stock of the Sunshine Mining Company, which is the actual bone of contention, but also for any other property of the estate for which he may not have accounted. * * *

Respondent concluded with this language:

* * * Respondent therefore is entitled to have an injunction entered herein restraining the said Katherine Mason from further proceeding in the said Idaho litigation pending the final determination of this proceeding, and is further entitled upon the termination hereof to have such temporary injunction made permanent."

and he prayed:

* * * that a temporary restraining order may be entered herein restraining Katherine Mason from further prosecution of the action in the Idaho court, and that such temporary restraining order shall be made permanent upon the conclusion of this litigation. Respondent further prays that it be adjudged that respondent has fully accounted for all the property of the estate of Amelia Pelkes, and that he has paid and turned over to Katherine Mason all the property of such estate to which she was entitled either by the terms of the will of Amelia Pelkes or by the voluntary settlement entered into between her and respondent. Also

respondent prays that a decree shall be entered herein finally winding up the affairs of the estate of Amelia Pelkes and discharging respondent as executor of such estate, and that he recover his costs from the petitioners."

To this return Katherine Mason interposed a demurrer and a motion to strike directed at the major portions of the return. Her position was that John Pelkes "• • • is not interested in the outcome of any litigation now pending in the District Court of the First Judicial District of the State [fol. 110] of Idaho, in and for the County of Shoshone, and that the same is immaterial, redundant and constitutes no defense to petitioner's petition herein filed save and except as to the mining stock other than the Sunshine" for the reason that he had transferred the stock to Evelyn H. Treinies and was no longer its owner. The position was also taken by Katherine Mason that the Superior Court sitting in probate was not clothed with jurisdiction in the estate to hear and determine the facts involved in the Idaho litigation and also that it did not have the power to enjoin and restrain the prosecution of the Idaho action.

An argument of these matters was had before the Honorable Fred H. Witt. He is and was a duly qualified and acting judge of the Superior Court of the State of Washington for Spokane County. He filed his written opinion in the cause, in which he stated:

"• • • it is competent and relevant to show that prior to and during all the probate proceedings, Katherine Mason knew all about the Sunshine stock; knew it was not inventoried and the reason therefor; and that Katherine Mason with full knowledge of the assets of the estate entered into an agreement settling all of their property rights under the will. • • •

"I am of the opinion that the litigation now pending in the Idaho courts is of the utmost importance in this proceeding. • • • The return to the citation has set up these facts concerning the Idaho action and assuming their truth, the Superior Court of Washington, having full and complete jurisdiction of the estate and the parties, should insist that the charges made by the petitioner against the executor in this proceeding be first investigated and determined before she can further prosecute the Idaho suit. • • •

"The demurrer is overruled; the motion to strike being addressed to material and evidentiary facts alike and raising practically the same issues as the demurrer, it is denied.

Upon the filing of this opinion John Pelkes immediately moved in the presiding department of the Superior Court of [fol. 111] Washington for Spokane County for a temporary restraining order, restraining prosecution of the Idaho action, and for a show cause order requiring Katherine Mason to submit herself for examination on oral interrogatories. Both motions were granted in orders signed by the Honorable William A. Huneke on the 4th day of March, 1934.

After the entry of these orders Katherine Mason and T. R. Mason separately applied to the Supreme Court of the State of Washington for writs of prohibition addressed to the Honorable Fred H. Witt and the Honorable William A. Huneke, as judges of the Superior Court of the State of Washington for Spokane County, and to all other members of that court. In those applications they each set out as exhibits the complaint filed by them in the Idaho litigation; the petitions of Katherine Mason and C. Harold Easter in the probate proceedings in Washington; the return of John Pelkes to the citation issued thereon; the opinion of Judge Witt above referred to; the temporary restraining order and the show cause order, dated March 4, and stated with reference thereto (we quote from the petition of Katherine Mason):

"* * * your petitioner caused said answer to citation to be attacked on the ground and for the reason that said answer to citation did not state facts sufficient to constitute a defense and also moved to strike a great portion of said answer to citation and objected to the jurisdiction of the Superior Court of the State of Washington for Spokane County to entertain jurisdiction of the matters and issues which the said John Pelkes attempted to have said court take cognizance of * * *."

They then called the court's attention to their averments in the complaint filed in the action in Idaho in which they alleged "that a settlement of all of the assets belonging to the said estate was had between * * * John Pelkes and * * * Katherine Mason, and that under the terms thereof [fol. 112] each became the owner of a one half interest in and to the said 30,598 shares," and after that reference

proceeded to attack the jurisdiction of the Superior Court of Washington for Spokane County, alleging:

"That the said Superior Court of the State of Washington, in and for the County of Spokane, is now and at all times has been without jurisdiction and without any authority to hear and/or try and/or determine the rights of this petitioner, and the said John Pelkes, arising out of said contract as hereinbefore alleged, and that said court is without jurisdiction in said estate proceeding to make any order of any kind, nature and/or description which would in anywise be binding upon the prosecution of the action in any other forum, and that said court was at all times herein mentioned and now is without jurisdiction to make any valid restraining order, either temporary or an injunction pendente lite, which in any manner affects the procedure of this petitioner in said Idaho action * * *.

"That said Superior Court of the State of Washington, in and for the County of Spokane, has no authority whatsoever to attempt a hearing and/or trial of the rights of your petitioner and the said John Pelkes in that certain action now pending in said Superior court and which action is entitled No. 15,496, In the Matter of the Estate of Amelia Pelkes, Deceased."

With reference to the show cause order, it was alleged:

"* * * that said Superior Court is without jurisdiction to make any order requiring your said petitioner to appear at any time other than the time of trial in said estate proceeding in said Superior Court * * *.

"That this applicant and/or petitioner has no speedy and/or adequate remedy by appeal or otherwise * * * for the reason that said Superior Court of the State of Washington, in and for the county of Spokane, is wholly without jurisdiction to hear and/or determine said cause as it now is attempting to assume and/or exercise said jurisdiction."

and concluded with this prayer:

"That this court issue its writ of prohibition commanding said Superior Court and further commanding the said Honorable Wm. A. Huneke and the Honorable Fred H. Witt to desist from any proceedings in said action, and from

exercising any power over the restraining order heretofore issued or any other writs or orders issued in said cause."

The Honorable Fred H. Witt filed a return to this application in which he there stated the position taken by counsel [fol. 113] for Katherine Mason in the argument before him:

"* * * that all the probate court could or should do in this proceeding was to remove John Pelkes as executor and appoint an administrator in his place and that thereafter such substituted administrator should proceed in a separate action brought against John Pelkes for an accounting and that therefore the affirmative matters plead by John Pelkes constituted neither a defense to the petition of Katherine Mason nor constituted any basis for the affirmative relief he prayed for."

Katherine Mason and T. R. Mason filed a joint brief in the Supreme Court of Washington in support of their application for writs of prohibition in which they set out the following specifications of error:

"I. The defendant, the Honorable Fred H. Witt, exceeded the jurisdiction of the Superior Court * * * in making and entering in the matter of the estate of Amelia Pelkes his written opinion therein.

"II. The defendant, the Honorable Wm. A. Huneke exceeded the jurisdiction of the Honorable Superior Court * * * in making and entering a temporary restraining order, together with an order to show cause, which is particularly set forth in petitioners' petitions, for the reason that said Superior Court was without jurisdiction to try and/or determine any of the matters and/or things in relation to said action pending in the District Court * * * of the State of Idaho * * *.

"III. That the Honorable Superior Court * * * exceeded its jurisdiction in attempting to restrain a further prosecution of said action in Idaho * * * for the reason that any judgment and/or decree made by said Superior Court * * * in said estate proceedings would not be res Judicata as to the commencement and/or prosecution of another action by the heirs of said estate in another forum. * * *

“V. That the Hōnorable Superior Court * * * exceeded its jurisdiction in attempting to enjoin and/or restrain the said petitioner, Katherine Mason, from the prosecution of said action pending within the State of Idaho, for the reason that the said petitioner Katherine Mason, had never subjected herself and has never been subject to the jurisdiction of the Superior Court * * * and said restraining order * * * was served upon said petitioner Katherine Mason, within the State of Idaho and outside of the jurisdiction of said superior court as aforesaid.”

That brief stated their position as follows:

“* * * the superior court sitting in probate for the purpose of handling all matters in connection with the probate of the estate of Amelia Pelkes, deceased, was wholly [fol. 114] and is wholly devoid of jurisdiction to determine a matter which has arisen solely and only between John Pelkes, the executor of said estate, acting in his personal capacity, as distinguished from his representative capacity, and Katherine Mason, acting in her capacity as an individual and not in her capacity as an heir to the estate of said Amelia Pelkes.”

They further contended that:

“* * * the superior court in the matter of the estate of Amelia Pelkes, deceased, did not have authority to go into or determine what agreement was made between Katherine Mason on the one hand and John Pelkes on the other with reference to a division after a decree of distribution had been entered of the property in the estate of the said Amelia Pelkes.”

The applications were submitted to the Supreme Court of Washington on oral argument and written brief, and were denied. Thereupon remittiturs issued from that Court to the Superior Court of the State of Washington for Spokane county, each of which stated:

“This cause having been heretofore submitted to the Court on the application of the petitioner for a writ of prohibition commanding said Superior Court of Spokane County to desist from any further proceedings in its cause No. 15496 * * * and from exercising any power over the

restraining order heretofore issued, and the court having fully considered the same and denied the application for the writ of prohibition, it is now ordered that the writ be denied and that the said John Pelkes have and recover * * * the costs of this action * * *. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings in accordance herewith. * * *

It is the law of the State of Washington that where there is a lack of inherent jurisdiction in a trial court to hear and determine a cause pending before it, a writ of prohibition must issue to restrain it from further proceedings and that in such case, appeal affords no relief. And it is further the law of the state that a denial of a writ of prohibition which is applied for on the ground that there is a lack of inherent jurisdiction in the lower court is tantamount to a holding that the court did have inherent jurisdiction to hear and determine the cause before it.

[fol. 115] These remittiturs did not come down until after the return day fixed in the temporary restraining order and show cause order entered by Judge Huneke on the 4th day of March, 1935. Upon receipt of the remittiturs, new orders to the same effect save that a later return date was fixed were signed by Judge Huneke. In response to the show-cause order, requiring Katherine Mason to submit for examination on oral interrogatories, an affidavit was filed in her behalf stating that she was physically unable to attend for such examination and requesting that Dr. J. T. Bird be appointed by the court to make a physical examination to substantiate this statement. Thereafter such proceedings were had that an order was entered appointing Dr. Bird and directing him to make a physical examination on the 22nd day of April, 1935, and report his conclusions to the said court. He made an examination and on April 24, 1935, filed a report setting out his conclusions, a part of which follow:

“My conclusions in this case, as the result of a consideration of this history, the physical findings and the laboratory findings are: That there is a certain amount of wear and tear that comes to us all with years, is present. This is manifested by the very slight changes in the retinal arteries, the dental condition, the slight amount of cardiac enlargement and possibly the blood pressure. The slight trace of albumen in the urine comes in this category. * * *

"I do not believe that except for an exacerbation of her nervous symptoms, that any change in her condition occurred at the time of her attack on April 16, 1935. This exacerbation should not incapacitate her more than a few days. I believe that physically and nervously Mrs. Mason can appear for deposition in Spokane, Washington, without running any risk of damaging her health. * * *"

Immediately upon the filing of this report Katherine Mason, through her counsel, orally moved for dismissal of her petition filed in said probate proceedings on the 19th day of December, 1934, and as the basis for her motion to dismiss, filed what purported to be a receipt for the property which she contended she had received from John Pelkes under her version of the partition agreement entered into between herself and himself at the time of the entry of the decree of distribution August 9, 1923. This receipt had been verified April 22, 1935, the day she was examined by Dr. Bird, and held in the possession of her counsel until Dr. Bird made his report, with the intention of using it only in the event his report was adverse to her contention that she was unable to present herself for examination on oral interrogatories. The said receipt was a false, inaccurate and self-serving declaration intended to bolster her position in the Idaho litigation.

Thereupon an order was entered adjudging Katherine Mason to be in contempt of the Superior Court of the State of Washington for Spokane County because of her failure and refusal to comply with its previous orders to submit herself for oral examination and further ordering that she be held in contempt until she purged herself by submitting to such examination.

Immediately upon the filing of this receipt John Pelkes served upon counsel for Katherine Mason and filed a petition in which he alleged that the said receipt was untrue, inaccurate and a self-serving declaration, and prayed that Katherine Mason be ordered to file a receipt which truly showed the property she had received under the partition agreement.

Within a few days thereafter he prepared a second and more elaborate petition which was also served upon counsel for Katherine Mason and filed in the said cause, in which he set out in detail the agreement of partition between him-

self and Katherine Mason above referred to, alleging that the property covered thereby was delivered pursuant to the terms thereof but that this partition was not called to [fol. 117] the attention of the court and that he had failed to procure receipts because he was ignorant of the law and did not know it was necessary to take these steps to have an order discharging him entered, but that he had believed until recently that the estate was closed automatically. He further stated he had justly accounted to Katherine Mason for all the assets of the estate and had delivered to her what she was entitled to and that he desired to make a showing of that accounting to the court and to prove that she had agreed to accept certain assets and that he had delivered those assets to her. He prayed that she be required to file a receipt for whatever property the court might find she had received, and that it be adjudged that he had fully accounted for all the property of the estate and had turned over to her all property to which she was entitled.

After the filing of this petition on May 17, Katherine Mason filed two separate and additional receipts, one of which was verified April 22, 1935, the date of her examination by Dr. Bird, and held in possession of her counsel until the date of its filing. Both these receipts were false, inaccurate and self-serving declarations and were objected to by John Pelkes for those reasons.

Katherine Mason made no return other than these receipts to either of the petitions of John Pelkes and thereupon, on the 25th day of May, 1935, on his motion an order to plead was entered, reciting:

“Katherine Mason is ordered to plead to the petition of John Pelkes aforesaid on or before Monday, May 27, 1935, at the hour of 10 o'clock A. M.; such pleading to be by way of answer or return to the petition.

“Done in open court this 25th day of May, 1935.

Wm. A. Huneke, Judge.”

[fol. 118] The only response made to that order was a showing filed by Katherine Mason that her husband T. R. Mason, purporting to employ special counsel other than those which Mrs. Mason had employed in her proceedings in the probate court and which both he and Mrs. Mason had employed in their applications for writs of prohibition in the Supreme Court of the State of Washington, had procured a restraining order from the District Court of Idaho,

in and for Shoshone County, restraining Katherine Mason, together with the said counsel which were still employed by her and were employed by T. R. Mason generally in the Idaho litigation, and likewise restraining John Pelkes and his counsel "from attempting to further prosecute or do anything in connection with a matter now pending in the Superior Court * * * entitled 'In the Matter of the Estate of Amelia Pelkes, Deceased'."

Thereafter and on the 31st day of May, 1935, a hearing was had on the petitions of John Pelkes, at the conclusion of which the following finding of fact was made with reference to the restraining order just referred to:

"* * * I find that proceeding to be fictitious not prosecuted in good faith, and that the Idaho court was without jurisdiction to enjoin John Pelkes, an officer of the court, from taking such steps as may be necessary or proper in the discharge of his functions as such officer. Neither was there jurisdiction, in view of the scope of the Idaho action, to enjoin Katherine Mason, a claimant to property of an estate in process of administration by this court, from participating in the disposition and closing of the estate."

The restraining order being thus disposed of, the court considered the merits of the cause pending before it and found that it was instituted April 27, 1922, by the filing of the will of Amelia Pelkes and that John Pelkes was appointed executor and continued in that relation to the court until the present time; that the stock in the Sunshine Mining Company was one of the assets of the estate; that it was in no way administered upon until the institution of the recent litigation; that the existence of the stock and the failure to inventory it was known to both John Pelkes and Katherine Mason; that on the rendition of the decree of distribution on August 9, 1923, and before any further steps were taken in the cause, Katherine Mason discussed with John Pelkes a partition of their interests in the estate; that she desired liquid assets; he was willing she should have them and thereupon agreed to give her certain described property, all of which had a ready cash value and was much more than she was entitled to under the decree of distribution; that in consideration of giving her that property, she agreed that he should take the remainder, including the stock of the Sunshine Mining Company, in his sole and undivided right in discharge of

his distributive share of the estate; that the partition agreement was fully performed, in so far as partition of the property was concerned, but that no receipts were given and nothing was done to close the estate and the cause continued without distribution of the property of the estate. Reference was made to the Idaho litigation and the fact that it was there contended "that a settlement of all the assets belonging to the estate was had between John Pelkes and Katherine Mason, by virtue of which each became the owner of a one half interest in 30,598 shares" of Sunshine stock. The court then referred to the petitions of Katherine Mason and C. Harold Easter and John Pelkes' returns to those petitions and the cross-petitions which he had filed, in all of which it was alleged administration of the estate was yet pending. It then found the proceeding was pending upon those petitions and Pelkes' answer and cross-petitions. It found that the estate was not to be distributed in accordance with the will of Amelia Pelkes but in accordance with a partition agreement between the heirs; that no hearing in respect to that partition agreement had been had; that it had not been approved by the court; that no receipts had been given filed or approved; and that Pelkes had not been discharged as executor.

The court then found:

"The agreement of distribution of the property of the estate which was made by John Pelkes and Katherine Mason after the entry of the decree of distribution was in all respects fair and equitable so far as concerned Katherine Mason. It was not affected by fraud, mistake or undue influence. Both parties entered into it with all material factors in mind, and through it Mrs. Mason received several thousand dollars more than she would have been entitled to under the will of Amelia Pelkes or the decree of distribution. The adventitious discovery of ore bodies in the properties of the Sunshine Mining Company several years after the agreement was made is the only occasion for attack upon it."

The court then set out in full the three receipts signed by Katherine Mason, which have been referred to above, and found:

"* * * None of the above papers is a true and correct receipt for Katherine Mason's distributive share of the

Amelia Pelkes estate as actually received by her. What she actually received, through the agreement between her and John Pelkes, executor, is stated in previous findings, especially findings 7 and 8. The receipts filed by her should be corrected to read as follows * * *."

Whereupon the court set out a receipt which in substance acknowledged that Katherine Mason had received certain of the liquid assets of the estate in lieu of her interest in the mining stocks in the estate, including the Sunshine stock, and that John Pelkes had received these in lieu of the assets which had been delivered to Katherine Mason.

The court then referred to the petition of Pemberton as Supervisor of the Inheritance Tax and Escheat Division, [fol. 121] and found that Pelkes as executor and the Supervisor had agreed on the value of the stock in the Sunshine Mining Company at the time of Amelia Pelkes' death, and that the inheritance tax was paid. It then concluded with the finding that all inheritance taxes due from the estate of Amelia Pelkes to the State of Washington had been paid.

It was also found that "the cause continued on the records of the court unclosed and without distribution of the estate" and that

"* * * none of the mining shares aforesaid were inventoried, nor were they then or thereafter, until the institution of the current litigation, referred to in the administration proceeding or in any way administered on. * * *"

After referring to the partition agreement above described, it was further found:

"* * * In making this agreement, both parties had in mind the shares of mining stock belonging to the estate, including the shares in litigation, which had not been inventoried or administered on, and both intended and agreed that all those shares should go to and be received by John Pelkes in his sole right * * *."

and

"The partition agreement was fully performed so far as partition of the property was concerned. Katherine Mason received from John Pelkes the property to which she was entitled thereunder and thereafter held and enjoyed it as her sole right. John Pelkes took the remainder of the

property of the estate and held and disposed of it as his own. No receipts were given for property received, no paper was executed or filed in court, and no steps were taken to close the estate, and the cause continued on the records of this court unclosed and without distribution of the property of the estate. Affairs so continued until 1934. * * *

Reference was then made to the allegation made by Katherine Mason in her petition:

"That under the terms of said will aforesaid, your petitioner is entitled to have distributed to her an interest in * * * the property (the mining stock above referred to) * * *."

The decree concluded with the following finding and adjudications:

[fol. 122] "From the time of the probate of the will of Amelia Pelkes and the appointment of John Pelkes as executor thereof to the present time, this court has possessed exclusive jurisdiction over her estate and the administration thereof. Katherine Mason personally has been within the jurisdiction of this court for all purposes connected with the distribution of the property of the estate of Amelia Pelkes, and the closing of the estate and discharge of the executor, from the time she presented to it her petitions for the removal of John Pelkes as executor and the appointment of an administrator c. t. a. All notices of hearings and proceedings served upon her since that time have been regular and sufficient to maintain jurisdiction over her person for the purposes of the findings and adjudications now made.

"Upon the foregoing findings and the entire record in this cause it is Ordered, Adjudged and Decreed as follows:

"I. under the laws of the State of Washington, it was competent for John Pelkes, as executor, and Katherine Mason, they being the sole beneficiaries under the will of Amelia Pelkes, to agree upon a settlement of the estate and a partition and distribution of the property of the estate * * *. Such agreement was subject to examination and approval or rejection by this court on petition of either party. My examination of the agreement * * * having convinced me that the agreement between Pelkes and Ma-

son was in all respects fair and equitable as concerns Mason, and Pelkes not having complained thereof, it is in all respects approved and is adopted as a settlement, participation and distribution originally made under the approval and order of this court, and effect shall be given to it as though it were embodied in the decree of distribution of this court.

"II. None of the receipts filed by Katherine Mason is correct, and all of them are disapproved and declared insufficient. She is ordered to file herein instantler a receipt reading as follows: (which we omit) * * * In the event of her failure to comply, this order shall stand in lieu of a receipt in those terms filed by her. It is found correct, and shall have the same effect as a receipt signed by her and filed herein and approved by me."

The decree above was rendered on the 31st day of May, 1935, and no appeal was taken therefrom and the time for appeal has expired and the said decree has now become a final, binding and conclusive determination and adjudication of the matters therein considered, and is binding on all the world.

[fol. 123] The law of the State of Washington provides:

"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment. * * *."

Rem. Rev. Stat., Section 1718 and the decisions of said state hold that if an appeal is not perfected within that time, the right to appeal has been lost.

The Findings, Order and Decree, entered in the matter of the estate of Amelia Pelkes, deceased, by the Superior Court of the State of Washington, for the County of Spokane, on the 31st day of May, 1935, as aforesaid was and is a final binding and conclusive determination and adjudication with respect to the division and distribution of the property of said estate between these defendants and is a final, binding and conclusive determination of all the issues there and here involved and merges in it all pre-existing causes of action which either Katherine Mason or John Pelkes may have had with reference to the stock of the Sunshine Mining Company or with respect to the administration of said estate, and the division and distribu-

tion of the property of said estate between these defendants and that said public acts, records and judicial proceedings of the State of Washington, are entitled to, and must be given full faith and credit by this Honorable Court by virtue of the provisions of Section 1, Article IV of the Constitution of the United States. Any proceedings or decrees based on or entered in the so-called Idaho litigation are null and void.

Not only did the defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane conduct the litigation which has been above referred to, but they also caused incompetency proceedings to be instituted against John Pelkes in the courts of the state [fol. 124] of California. Title VII of the Civil Code of California, Section 1383, Par. 8 (1923) is now and at all times since 1923 has been in full force and effect therein and provides as follows:

"If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation."

At the time of the institution of that proceeding John Pelkes was a widower without issue and Katherine Mason was the sole surviving child of his deceased spouse so that by these provisions she would receive all his property if he died intestate. Moreover, some time in the year 1933 John Pelkes had entered into the agreement above referred to with Evelyn H. Treinies by which he agreed to transfer to her his stock in the Sunshine Mining Company in consideration of an agreement on her part to care for him

and support him during the remainder of his life, and at or about the same time he executed a will in her favor by which she was left substantially all of his property. The petitioner in the proceedings in California challenged the validity of these instruments on the ground that at the time of their execution and ever since John Pelkes was incompetent and unable to contract or devise his property. An attempt was made to set aside both the will and the [fol. 125] contract and to have a guardian appointed of his person so he could not thereafter execute another will. The court, however, found that John Pelkes was of sound mind and refused to set aside either instrument. Thereupon, the petitioner, acting under the instructions of the above named defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane took an appeal from such decision and order to the Supreme Court of California, and the matter is now pending on that appeal.

Throughout these proceedings the defendants, other than the Sunshine Mining Company, have so conducted themselves as to impose upon the plaintiffs the maximum burden and expense possible. They have instituted against the plaintiffs, either separately or collectively, the following proceedings:

The petition of Katherine Mason herein for John Pelkes' removal as executor of the estate of Amelia Pelkes, deceased.

The action in Idaho, referred to above, in which the defendants denied the jurisdiction of this court to pass on the controversy submitted to it by Katherine Mason in the said petition.

A proceeding in Cobb County, California, instituted in 1934, alleging the incompetency of John Pelkes and seeking the appointment of a guardian to take possession of his person and property.

Two prohibition proceedings instituted in the Supreme Court of Washington to prevent the Superior Court of Spokane County from continuing with the very litigation it was invited to adjudicate upon in the petition of Katherine Mason above referred to.

A second incompetency proceeding instituted in the county of San Francisco, California, in 1935, also for the appointment of a guardian to take control of the person

and property of John Pelkes and an appeal from a decision adverse to the defendants herein to the Supreme Court of California.

It is the purpose of defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane to continue to harrass and distress these defendants [fol. 126] with vexatious litigation involving the title to the stock of the Sunshine Mining Company above referred to, not in the belief that such litigation is meritorious but solely for the purpose of forcing upon these defendants a compromise and settlement to avoid further expense and harrassment, and they will institute other litigation with that end in view unless permanently restrained by this Court.

The plaintiff Sunshine Mining Company has refused to pay to these defendants the dividends which have accrued on the 16,000 shares of its capital stock above referred to since the 4th day of August, 1934.

Wherefore, these defendants pray that the clerk of this Court be directed forthwith to pay over to defendant Evelyn H. Treinies all sums which shall have been paid into his hands as dividends on the stock of the Sunshine Mining Company, above referred to, and further pray that this Court adjudge that the decree entered by the Superior Court of the State of Washington in and for Spokane County on the 31st day of May, 1935, is a final, binding adjudication, determining the rights of Katherine Mason and John Pelkes and their privies in and to the stock of the Sunshine Mining Company, above referred to; and further adjudge that during the pendency of the proceedings "In the matter of the Estate of Amelia Pelkes, Deceased," being No. 15496 of the probate docket of the Superior Court of the State of Washington for Spokane County, that court was a court of exclusive jurisdiction and that by reason of that fact all proceedings and decrees had or entered in the Idaho litigation referred to herein, were null and void and conferred no right, title or interest in or to [fol. 127] the stock of the Sunshine Mining Company above referred to in Katherine Mason or T. R. Mason or their privies; and that this Court order the plaintiff Sunshine Mining Company to recognize Evelyn H. Treinies as the sole owner of the stock in the Sunshine Mining Company above referred to and that it pay to her the dividends which

have heretofore accrued and which may hereafter accrue on said stock and recognize such transfers of said stock as she may make hereafter; and that it enter an order enjoining Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane and their privies from instituting at any time any litigation in any court for the purpose of asserting or acquiring any right, title or interest in or lien upon the stock of the Sunshine Mining Company above described or the dividends which have accrued thereon or which may hereafter accrue thereon, which is in conflict with or in derogation of the adjudication of this court; and the said defendants further pray that they may recover their costs expended herein from the said defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane, and for such other and further relief as to the Court may seem meet, proper and equitable.

Graves, Kizer & Graves, H. J. Hull, Attorneys for Defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane & Eastern Branch), Administrator with the Will Annexed of the Estate of John Pelkes, Deceased.

(Service Accepted.)

(Duly verified.)

[fol. 128] IN UNITED STATES DISTRICT COURT

REPLY OF SUNSHINE MINING COMPANY TO ANSWER AND REPLY OF DEFENDANTS KATHERINE MASON AND T. R. MASON, WIFE AND HUSBAND; LESTER S. HARRISON AND GRACE G. HARRISON, HUSBAND AND WIFE; WALTER H. HANSON AND EDNA B. HANSON, HUSBAND AND WIFE, AND F. C. KEANE—Filed April 25, 1937

Comes now the plaintiff, Sunshine Mining Company, a corporation, and for its reply to the answer and reply of defendants, Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, admits, denies and alleges as follows:

1

For reply to Paragraph XXI of the answer and reply of said defendants, plaintiff denies that portion thereof

reading as follows: "but these answering defendants allege that said sum of money belongs to the defendants Katherine Mason and T. R. Mason, her husband" insofar as the same is inconsistent with the allegations contained in plaintiff's complaint.

2

For reply to Paragraph XXIV of the answer and reply of said defendants, plaintiff denies that portion thereof reading as follows: "allege that in truth and in fact the said defendant J. C. Cheney, as receiver or otherwise, has no claim or interest in said stock hereinabove referred to or the dividends accrued or accruing thereon", insofar as the same is inconsistent with the allegations contained in plaintiff's complaint.

3

For answer to Paragraph I of the cross-complaint of said defendants, plaintiff admits that portion thereof down to and including the word "Idaho" on line 11, page 8, but denies the balance of said paragraph I of said defendants' cross-complaint except insofar as the same may be admitted in plaintiff's complaint.

4

For answer to Paragraphs II, III, IV and V of said [fol. 129] defendants' cross-complaint, plaintiff admits the same.

5

For answer to Paragraph VI of the cross-complaint of said defendants, plaintiff has no knowledge or information sufficient to form a belief concerning the purpose of the action therein alleged and, therefore, denies said Paragraph VI and each and every allegation therein contained.

6

For answer to Paragraph VII of the cross-complaint of said defendants, plaintiff admits that the said John Pelkes and Evelyn H. Treinies appeared separately in the action pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, but does not have any information or knowledge sufficient to form a belief concerning the other allegations in said

Paragraph VII contained and, therefore, denies all other allegations in said Paragraph VII contained except insofar as said paragraph may be admitted by the plaintiff in its complaint.

7

For answer to Paragraph VIII of said defendants' cross-complaint, plaintiff has no knowledge or information thereof sufficient to form a belief as to the truth of the allegations and, therefore, denies said Paragraph VIII and each and every allegation therein contained, except insofar as the same may be admitted by the allegations contained in plaintiff's complaint.

8

For answer to Paragraph IX of said defendants' cross-complaint, plaintiff admits that John Pelkes filed an amended and supplemental answer prior to the commencement of the trial of the action in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, but has no knowledge or information concerning the other allegations therein contained, and therefore, denies the same, except insofar as the same may be admitted by the allegations contained in plaintiff's complaint.

9

For answer to Paragraph X of the cross-complaint of the said defendants, plaintiff alleges that it does not have knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and, therefore, denies said Paragraph X, and each and every allegation therein contained, except as the same may be admitted by the allegations in plaintiff's complaint.

10

For answer to Paragraph XI of cross-complaint of said defendants, plaintiff admits that Evelyn H. Treinies appeared in the Idaho action, but alleges that it does not have knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph XI contained and, therefore, denies the balance of said paragraph and each and every allegation therein contained, except insofar as the same may be admitted by the allegations in plaintiff's complaint.

11

For answer to Paragraph XII of cross-complaint of said defendants, plaintiff admits that said action went to trial in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and that on or about the 28th day of September, 1935, said action was decided by the District Court of the First Judicial District; that said judgment was in favor of the plaintiffs named therein for 7649 shares of capital stock of said defendant therein, Sunshine Mining Company; that the defendant, Evelyn H. Treinies, was the owner of the remainder of said 16,000 shares of stock in said Sunshine Mining Company. Plaintiff alleges that it does not have knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph XII contained and, therefore, denies the same except insofar as the allegations may be admitted by plaintiff's complaint.

12

For answer to Paragraph XIII of the cross-complaint of said defendants, plaintiff admits that John Pelkes and Evelyn H. Treinies appealed to the Supreme Court of the state of Idaho; that the Sunshine Mining Company likewise appealed to the Supreme Court of the state of Idaho; that it superseded said judgment in accordance with the laws of the state of Idaho; and that the stock involved in said Idaho action and in said appeal is the identical stock involved in this said litigation; but as to the remaining allegations in said paragraph XIII contained, plaintiff alleges [fol. 131] that it has no knowledge or information thereof sufficient to form a belief as to their truth, and, therefore, denies the balance of said paragraph XIII and each and every allegation therein contained except insofar as the allegations may be admitted by plaintiff's complaint.

13

For answer to the second paragraph numbered XIII in the cross-complaint of said defendants, this plaintiff denies the same and each and every allegation therein contained except insofar as the same may be admitted by the allegations contained in plaintiff's complaint.

14

For answer to Paragraph XIV of cross-complaint of said defendants, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and, therefore, denies said paragraph XIV and each and every allegation therein contained except insofar as the same may be admitted by the allegations in plaintiff's complaint.

15

For answer to Paragraph XV of the cross-complaint of said defendants, plaintiff admits that said appeal was heard by the Supreme Court of the state of Idaho and that said Supreme Court by its final judgment and opinion modified the decree entered by the Trial Court, but as to the remaining allegations in said Paragraph XV contained, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to their truth and, therefore, denies the balance of said Paragraph XV, and each and every allegation therein contained, except insofar as the same may be admitted by the allegations in plaintiff's complaint.

16

For answer to Paragraph XVI of the cross-complaint of said defendants, plaintiff admits that a restraining order, as more fully appears in the proceedings in said Idaho action, was entered and approved by the Supreme Court of the State of Idaho, but plaintiff alleges that it has no knowledge or information concerning the other allegations therein contained and, therefore, denies the same except insofar as they may be admitted by the allegations contained in plaintiff's complaint.

17

[fol. 132] For answer to Paragraph XVII of the cross-complaint of said defendants, plaintiff admits that portion thereof ending with the words "United States" on line 15 of page 16 of said cross-complaint, and likewise admits that Pelkes and Treinies commenced the action referred to in the bill of interpleader, which action is now pending in the Superior Court of Yakima County, State of Washington, but as to the other allegations in said Paragraph XVII con-

tained plaintiff alleges that it does not have sufficient knowledge or information to form a belief as to their truth and therefore denies the same except insofar as they may be admitted by the allegations contained in plaintiff's complaint.

18

For answer to Paragraph XVIII of the cross-complaint of said defendants, plaintiff admits the same down to and including the word "Company" on line 29 of said paragraph, page 16. Said plaintiff further admits that it complied with the judgment of the Supreme Court of the State of Idaho; that at the time of doing so if had knowledge of a purported order entered in the matter of the Estate of Amelia Pelkes, deceased, in the Superior Court of the State of Washington, in and for Spokane County, on the 31st day of May, 1935; but denies each and every other allegation in said paragraph XVIII contained.

19

For answer to Paragraph XIX of the cross-complaint of said defendants, plaintiff admits the same.

20

For answer to Paragraph XX of the cross-complaint of said defendants, plaintiff admits that Pelkes & Treinies applied to the Supreme Court of the United States for a writ of certiorari; that the same was denied; that the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), acting as administrator with the will annexed of the estate of John Pelkes, deceased, filed in the courts of Washington an amended complaint; that said parties procured the appointment of J. C. Cheney as receiver without notice and that said J. C. Cheney never posted any bond other than a thousand-dollar bond for the faithful performance of his duties as receiver. As to all other allegations in said Paragraph XX contained, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to their truth and, therefore, denies the [fol. 133] same and each and every allegation therein contained except insofar as the same may be admitted in plaintiff's complaint.

21

For answer to Paragraph XXI of the cross-complaint of the defendants, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore denies said paragraph XXI and each and every allegation therein contained.

22

For answer to Paragraph XXII of the cross-complaint of the defendants, this plaintiff admits that the stock of the Sunshine Mining Company has fluctuated in price upon the New York Curb Exchange, and further admits that the plaintiff has not recognized any assignment of said stock during the pendency of the litigation therein referred to, but alleges that it has no knowledge or information sufficient to form a belief concerning the truth thereof and, therefore, denies all other allegations in said Paragraph XXII contained except insofar as the same may be admitted by the allegations in said plaintiff's complaint.

23

For answer to Paragraph XXIII of defendants' cross-complaint, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore denies said Paragraph XXIII and each and every allegation therein contained.

24

For answer to Paragraph XXIV of the cross-complaint of said defendants, plaintiff admits that, pursuant to the order of the Supreme Court of the State of Idaho directed to the District Court of the First Judicial District, a certain judgment was entered against the defendants John Pelkes and Evelyn H. Treinies for the sum of \$19,429.73, which said judgment was entered on the 18th day of August, 1936; that said cross-complainants issued execution on said judgment and garnished the Sunshine Mining Company, but that said execution and garnishment proceedings have not been carried through to completion. Plaintiff further admits that it has issued out of the 16,000 shares of stock originally standing in the name of Evelyn H. Treinies 701 shares, which are now in possession of the Clerk of the District

Court of the First Judicial District of the State of Idaho, and has in its possession the dividends accrued and accruing [fol. 134] thereon since the 4th day of August, 1934; that the plaintiff does not have or claim to have any interest in said 701 shares of stock, together with said dividends accrued and accruing thereon, and is ready and willing to recognize the ownership of said stock and pay the dividends accrued and accruing thereon to the rightful owners as may be adjudged by the above entitled court. As to all other allegations in said Paragraph XXIV, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same except insofar as the same may be admitted by the allegations in plaintiff's complaint.

25

For answer to Paragraph XXV of the cross-complaint of said defendants, plaintiff admits that the said cross-complaining defendants instructed the Sheriff of Shoshone County to execute upon said 701 shares of capital stock of the Sunshine Mining Company, which stock was in the hands of the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for Shoshone County. As to the remaining allegations in said paragraph XXV contained, said plaintiff alleges that it has no knowledge or information thereof sufficient to form a belief as to their truth and, therefore, denies all other allegations in said Paragraph XXV contained.

26

For answer to Paragraph XXVI of the cross-complaint of said defendants, plaintiff admits that Evelyn H. Treinies has been the principal party defendant in the Idaho action, but as to the remaining allegations in said Paragraph XXVI contained plaintiff alleges that it has no knowledge or information thereof sufficient to form a belief as to their truth and therefore denies the same.

27

For answer to Paragraph XXVII of the cross-complaint of said defendant, the plaintiff denies the same and each and every allegation therein contained.

28

For answer to Paragraph XXVIII of the cross-complaint of said defendants, plaintiff denies the same and each and

[fol. 135] every allegation therein contained except insofar as said allegations contained in said Paragraph XXVIII may be admitted by the allegations contained in plaintiff's complaint.

Wherefore, plaintiff, Sunshine Mining Company, having fully answered and replied to the answer and cross-complaint of said defendants, prays for judgment in accordance with the prayer in its complaint.

Nat U. Brown, C. W. Halverson, James E. Gyde,
James E. Gyde, Jr., Solicitors for Plaintiff.

(Duly verified.)

(Service Accepted.)

[fol. 136] IN UNITED STATES DISTRICT COURT

REPLY AND ANSWER OF KATHERINE MASON ET AL. TO CROSS-COMPLAINT OF DEFENDANTS EVELYN H. TREINIES AND SEATTLE-FIRST NATIONAL BANK (SPOKANE AND EASTERN B. SCH), ADMINISTRATOR WITH THE WILL ANNEXED OF JOHN PELKES, DECEASED—Filed May 1, 1937

Come now the defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, and by way of reply and answer to the so-called affirmative answer to the bill of interpleader filed herein by the plaintiff, and by way of reply and answer to the affirmative answer to the answer and reply of defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, and also by way of reply and answer to the so-called cross-complaint against the plaintiff Sunshine Mining Company and the defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, admit, deny and allege:

I

These answering defendants admit the corporate existence of defendant First National Bank of Seattle (Spokane

and Eastern Branch), and admit that John Pelkes died on the 16th day of October, 1936, but deny that the said John Pelkes was a resident of Spokane County in the State of Washington, or that he was a resident of the State of Washington, and deny that at all times subsequent to the 28th day of December, 1936 said corporation was or that it now is the duly qualified or acting administrator with the will annexed of the estate of John Pelkes, deceased.

[fol. 137]

II

These answering and replying defendants admit that Sunshine Mining Company is a corporation existing under and pursuant to the laws of the State of Washington, and admit that it has its principal place of business within the State of Washington in the City of Yakima, County of Yakima, State of Washington. Further answering the allegations contained in Paragraph 2, these answering defendants allege the fact to be that said plaintiff Sunshine Mining Company is licensed to do business as a foreign corporation within the State of Idaho; that all of its mining property and all of its property is located within the State of Idaho, which said property consists of its mine located in Shoshone County, State of Idaho; that all of its books are kept within the State of Idaho; and that in truth and in fact said defendant Sunshine Mining company has actually and in truth migrated to the State of Idaho, the only business conducted outside of the State of Idaho being a transfer office at Yakima, its principal place of business within the State of Washington, and the fact that some of its directors' meetings are held within the State of Washington.

III

Answering Paragraph 3 of said so-called cross-complaint, these answering defendants admit that the Superior Courts of the State of Washington are courts of record having original and general jurisdiction of all civil causes involving more than \$100.00 arising within the territorial limits of the state and that said jurisdiction is legal and equitable, but deny that they exercise equitable jurisdiction when sitting in probate.

These answering defendants admit that the constitution and laws of the State of Washington provide all of the matters and things set forth from the bottom of page 17

over to and including the allegation beginning "The situs of stock * * *" on page 19 of said so-called cross-complaint.

[fol. 138] Answering the allegation beginning "The situs of stock", these defendants deny that the situs of stock in a corporation organized or existing under the laws of the State of Washington is in the State of Washington, and deny that upon the death of the owner administration must be had within the state, and by way of further answer to said allegation, allege that said corporation has by virtue of its compliance with the laws of the State of Idaho become subject to the laws of the State of Idaho, and to all intents and purposes is subject to all laws of the State of Idaho in relation to its internal affairs.

Answering the allegations found on page 21, commencing with the words "Under the laws of the State of Washington * * *", these answering and replying defendants deny that under the laws of the State of Washington as established by its statutes or the decisions of the Supreme Court that the Superior Court of the state sitting in probate has jurisdiction to inquire into, approve or ratify, or refuse to approve or ratify all partition agreements entered into by the heirs of estates being probated, either before or after the entry of a decree of distribution. Deny that it is against the public policy of the State of Washington to permit heirs to withhold from administration or probate property of an estate which is in the course of probate, and deny that upon discovery of assets which have been withheld from probate it is the duty of the superior court sitting in probate to administer upon those assets to the same extent or in the same manner as other assets of the estate. Deny that the inclusion of a residuary clause in a decree of distribution would not deprive that court of jurisdiction in the particular estate to administer upon assets which had not been inventoried or called to its attention prior to the entry of a decree, and allege that the residuary clause in the decree of distribution in the matter of the estate of Amelia Pelkes, deceased, was sufficient under the laws of the State of Washington, and actually did vest title to all property of said estate in the heirs of said estate, [fol. 139] to-wit John Pelkes and Katherine Mason. Admit that after the entry of a decree of distribution, that court retains jurisdiction to inquire whether the executor has delivered the assets of the estate as required by law, but

these answering defendants allege the fact to be that such inquiry is limited solely and only to a determination as to whether such assets have been actually delivered to the parties entitled thereto.

Answering the paragraph found on page 22 of said so-called cross-complaint, admit that said Superior Court of the State of Washington for Spokane County was possessed of exclusive jurisdiction over the proceedings in the matter of the estate of Amelia Pelkes, but deny that said jurisdiction was retained by said court until approval of the receipt of beneficiaries or the making of an order of final discharge of the executor, and allege the fact to be that the possession and title to all of the assets of said estate had passed out of the hands of the said executor and had vested and were vested in parties other than any parties to said probate proceeding of May 31, 1935. Deny that it is essential to the closing of an estate that receipts of the distributees be filed, examined or approved by the court, or that an order be made closing the estate or discharging the executor or administrator. Deny that whereby an agreement between the executor or administrator of the one part and beneficiaries or distributees of the other part a distribution is made on other terms or in another manner than those fixed by the will or decree of distribution, such substituted distribution must be submitted to or approved by the court in which the estate is pending, or that such court has power to accept, reject or modify the terms or method of settlement as justice may require.

IV

These answering defendants admit the allegations found in the first two paragraphs of paragraph numbered 5 on [fol. 140] page 23 of said so-called cross-complaint.

Answering the third paragraph on page 23, beginning "The administration . . .", these answering defendants deny that the administration of the estate of Amelia Pelkes remained open or pending from the date of the appointment of John Pelkes as executor on, to-wit, the 27th day of April, 1922, until his discharge on the 31st day of May, 1935, and allege the fact to be that the said estate was fully closed by the decree of distribution made on the 9th day of August, 1923.

Answering the last paragraph on page 35 of said so-called cross-complaint, these answering defendants deny

that it is the law of the State of Washington that where there is a lack of inherent jurisdiction in a trial court to hear or determine a cause pending before it, a writ of prohibition must issue to restrain it from further proceedings, or that in such case appeal affords no relief. Deny that it is further the law of the state that a denial of a writ of prohibition which is applied for on the ground that there is a lack of inherent jurisdiction is tantamount to a holding that the court did have inherent jurisdiction to hear or determine the cause before it, and these answering defendants allege the fact to be that the granting or refusal to grant a writ of prohibition is a discretionary act, and allege the fact to be that said writ was denied for the reason and upon the ground as urged by the cross-complaining defendants that an adequate remedy was open to these answering defendants on appeal.

These answering defendants admit the allegations to be found in the paragraph commencing on page 36, but deny that said receipt was a false, inaccurate or self-serving declaration, or that the same was intended to bolster her position in the Idaho litigation.

[fol. 141] Answering the first paragraph on page 38 of said so-called cross-complaint, these answering defendants deny that both of said receipts were false, inaccurate or self-serving declarations, and allege the fact to be that said receipts so filed by the said Katherine Mason were correct in every particular.

Answering the next allegation with reference to the order made by Judge Huneke requiring Katherine Mason to plead to said petition on or before Monday, May 27, 1935, these answering defendants allege the fact to be that the said Judge Huneke was wholly without jurisdiction to make or enter any such order and that the same was void from its inception.

These answering defendants admit the allegations to be found on pages 39, 40, 41, 42, 43 and 44, down to the paragraph commencing "The Findings, Order and Decree", but allege the fact to be that said Superior Court of the State of Washington was absolutely without jurisdiction to make or entertain said proceeding, that its order with reference to the validity or effect of the Idaho restraining order was a nullity, that said proceeding was not a trial of the action on its merits, that no proper service was ever had on this answering defendant Katherine Mason, and that all of said

proceedings so had in said court from and after the 31st day of May, 1935, in said estate proceedings were and are void and of no effect whatsoever.

Answering the paragraph commencing "The Findings, Order and Decree" on the bottom of page 44 of said so-called cross-complaint, these answering defendants deny that the Findings, Order and Decree entered in the matter of the estate of Amelia Pelkes, deceased, by the Superior Court of the State of Washington for the County of Spokane on the 31st day of May, 1935, or any other was or is a [fol. 142] final binding or conclusive determination or adjudication with respect to the division or distribution of the property of said estate between these defendants, or that the same is a final binding or conclusive determination of all of the issues there or here involved, or merges in it all preexisting causes of action which either Katherine Mason or John Pelkes may have had with reference to the stock of the Sunshine Mining Company, or with respect to the administration of said estate, and deny that the division or distribution of the property of said estate between the defendants, or that said public acts, records or judicial proceedings of the State of Washington are entitled to or must be given full faith and credit by the provisions of Section 1, Article IV of the Constitution of the United States, or any other provision of the Constitution of the United States whatsoever.

Deny that any proceedings or decree based on or entered in the Idaho litigation are null or void, and as a further answer to the allegations therein contained, these answering defendants allege the fact to be that said so-called Findings, Order and Decree were plead by the defendant John Pelkes in the Idaho action as an estoppel by judgment, that the same was submitted to the district court of the First Judicial District of the State of Idaho for court determination, that said so-called Findings, Order and Decree of May 31, 1935 did not affect the rights of the plaintiffs in said action, to-wit, Katherine Mason and T. R. Mason, her husband, from maintaining the Idaho action here relied upon by these answering defendants, and that thereafter the Supreme Court of the State of Idaho determined that said so-called Findings, Order and Decree were in fact a nullity and that the Washington court did not have or entertain the jurisdiction necessary to make any such so-called Findings, [fol. 143] Order and Decree, and that thereafter the cross-

complaining defendants applied to the Supreme Court of the United States for a writ of certiorari basing their right to the issuance and granting of such writ solely and only upon the provisions of Section 1, Article IV of the Constitution of the United States, namely, that the Idaho courts had failed to give full faith and credit to what the cross-complaining defendants contended and are contending was a valid final judgment in said Washington action, and that thereafter said writ of certiorari was denied and that by the denial of said writ of certiorari the judgment of the Supreme Court of the State of Idaho determined that said so-called Findings, Order and Decree were not and did not constitute a final adjudication of the rights of the parties, and that the same did not create an estoppel by judgment, had the effect of merging any rights which the cross-complaining defendants had in said so-called Washington judgment in the Idaho judgment, and that said so-called judgment made by the Superior Court of the State of Washington for Spokane County, under date of May 31, 1935, was at the time of its making and rendition void and of no effect, and that by submission of said matter to the Idaho court and a decision thereon by the Idaho court, the Idaho judgment became and now is *res judicata* as far as any rights or pretended rights of the cross-complaining defendants are concerned, and said cross-complaining defendants are barred and estopped from asserting any right or rights under or by virtue of said so-called and purported judgment.

Answering the allegations commencing in the first paragraph of page 45, these answering defendants deny each and every allegation therein contained save and except that they admit the provisions of Section 1383 of the Civil Code of California, and admit that the said John Pelkes was a widower without issue and that Katherine Mason was the [fol. 144] sole surviving child of his deceased spouse. These answering defendants also admit that in the fall of the year 1933 John Pelkes had entered into an agreement with the defendant Evelyn H. Treinies by which he agreed to transfer to her his stock in the Sunshine Mining Company in consideration of an agreement on her part to care for and support him during the remainder of his life, and these answering defendants allege the fact to be that pursuant to the terms of said agreement so made the said John Pelkes actually delivered said stock to the said defendant Evelyn

H. Treinies during the fall of 1933 and that from and after said date and at all times since, the said defendant Evelyn H. Treinies has been the sole owner thereof.

Answering the remainder of the allegations contained in said paragraph, these answering defendants have no knowledge or information as to the allegations therein contained, and for lack of such information deny each and every allegation therein contained.

These answering defendants deny that throughout these proceedings these answering defendants have so conducted themselves as to impose upon the cross-complaining defendants the maximum burden or expense possible, and allege that the said cross-complaining defendants have conducted themselves so as to impose upon these answering defendants the maximum burden and expense possible in that after the determination of the action in the Idaho court they instituted an action in the Superior Court of Spokane County in which they sought the same relief which they are now seeking and to which action demurrers interposed by these answering defendants were sustained, and upon the sustaining of said demurrers, the cross-complaining defendants moved for a dismissal of said action so instituted. These answering defendants also allege that the action now pending in the Superior Court of Yakima County, State of [fol. 145] Washington, was instituted on the same theory and for the same purpose as the action which was theretofore dismissed in the Superior Court of Spokane County, and that each of said actions were instituted solely for the purpose of vexing, harrassing and annoying these defendants and causing these defendants to spend large sums of money in the defense of said actions. These answering defendants deny that it is the purpose of defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane to continue to harrass or distress with vexatious litigation involving the title to the stock of the Sunshine Mining Company above referred to, and deny that any litigation has been instituted by these answering defendants or any of them other than in the belief that such litigation is meritorious and that it was done solely for the purpose of forcing upon these defendants a compromise or settlement to avoid further expense and harrassment, and in that connection, these answering defendants allege the fact to be that the cross-complaining defendants have nothing to settle, but that in truth and in fact all of the assets

involved in this action belong to and are the property of these answering defendants and that the said cross-complaining defendants have no interest whatsoever or at all therein, and that the actions of the cross-complaining defendants are all being had for the sole and only purpose of compelling these answering defendants to make a settlement with said cross-complaining defendants, and these defendants further deny that these answering defendants will institute other litigation with that end in view unless permanently restrained by this court.

These answering defendants have no information as to the allegations contained in the paragraph beginning "The plaintiff Sunshine Mining Company" to be found on page 48 of said so-called cross-complaint, and for lack of such information, deny each and every allegation therein contained.

[fol. 146] Wherefore, these answering defendants having fully answered the purported cross-complaint of said cross-complaining defendants, demand that the same be dismissed and that they take nothing thereby, and that these defendants do have and recover their costs from said cross-complaining defendants herein incurred, and that the court, on the trial of the above entitled cause, give to these answering defendants the relief prayed for in the cross-complaint heretofore filed in the above entitled cause.

Lester S. Harrison, Kellogg, Idaho; Cox and Ware, Lewiston, Idaho; Richard S. Munter, Spokane, Washington; Walter H. Hanson, F. C. Keane, Wallace, Idaho, Solicitors for Answering Defendants and Cross-complainants.

(Duly verified.)

[fol. 147] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND PLEADINGS OF KATHERINE MASON ET AL.—Filed May 3, 1937

Good cause appearing, It is Hereby Ordered, that the defendants, Katherine Mason and T. R. Mason, wife and husband; Lester S. Harrison and Grace G. Harrison, husband and wife; Walter H. Hanson and Edna B. Hanson, husband and wife; and F. C. Keane; upon their motion for leave to amend their pleadings in the above entitled matter,

as appears by the amendments thereto this day filed, is granted.

Dated this 3rd day of May, 1937.

Charles C. Cavanah, District Judge.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO BE INSERTED BETWEEN LINES 17 AND 18, [fol. 148] PAGE 23, OF THE CROSS-COMPLAINT OF DEFENDANTS, KATHERINE MASON AND T. R. MASON, WIFE AND HUSBAND; LESTER S. HARRISON AND GRACE G. HARRISON, HUSBAND AND WIFE; WALTER H. HANSON AND EDNA B. HANSON, HUSBAND AND WIFE; AND F. C. KEANE—Filed May 3, 1937

These answering defendants further allege:

That in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, it was urged on behalf of said Pelkes and Treinies that the so called decree of the Superior Court of the State of Washington, in and for the County of Spokane, sitting in probate, constituted a prior adjudication and bar and that the suit so pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, was barred by such previous adjudication and decree of the said Superior Court of Washington, and it was contended in said court that the said decree determined the validity of the identical claim which was being presented by the Masons in the Idaho proceedings.

The District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone denied the plea of prior adjudication and bar and determined and adjudicated and decreed that the same did not constitute a bar to the maintenance of the action by the Masons.

Thereafter Evelyn H. Treinies and John Pelkes appealed to the Supreme Court of the State of Idaho, and among the errors assigned on said appeal set forth the failure of the District Court to give proper effect to the claimed conclusiveness of the pretended decree of the Superior Court of the State of Washington, sitting in probate, as required by Article IV of Section 1 of the Constitution of the United States.

In order to supersede the judgment of the District Court [fol. 149] the said Pelkes and Treinies deposited 16,000 shares of the stock of Sunshine Mining Company, which was the stock in controversy, in the registry of the court and Sunshine Mining Company, together with the said Pelkes and Treinies, issued and delivered certificates for that amount and deposited the same as above alleged.

The Supreme Court of Idaho upon appeal held and decreed that Katherine Mason and her husband, T. R. Mason, were entitled to 15,299 shares of the capital stock of Sunshine Mining Company, being the stock represented by the certificates theretofore deposited, and further ordered, directed and required the said defendants Pelkes and Treinies to pay to the plaintiffs in said action the sum of \$19,000 and more, which they had collected on said stock as dividends and which money in good conscience belonged to the said Katherine Mason and T. R. Mason, plaintiffs. The Supreme Court of Idaho further considered the plea in abatement or of prior adjudication and bar based upon the so called decree, more particularly designated in said action by said defendant Pelkes as an order after probate, and the Supreme Court of Idaho held:

"First. That Mr. Mason had a vested community interest in the shares of stock the subject of the litigation, under the Idaho statute, and that the injunction issued upon his petition had been violated by Pelkes and his counsel in the ex parte proceeding whereby the so called Washington order in probate was procured;

Second. That a court is not required to give full faith and credit to a judgment rendered by a court of another state, which has no jurisdiction of the subject-matter or of the parties.

Third. It was established that, after the decree of distribution, Pelkes and Mrs. Mason in Idaho divided the Community property previously owned by Pelkes and his wife, each taking one-half, and the evidence sustained the contention of Mrs. Mason that 15,299 shares of Sunshine stock was by that agreement assigned to her and held in trust by Pelkes for her.

Fourth. The distribution of property which both parties claim was made, being one-fourth to Mrs. Mason and three-

fourths to Pelkes, included that made under the omnibus [fol. 150] clause of the decree which distributed 'any other property not now known or described,' and disposed of the entire estate, including the mining stock, and both parties so understood and agreed. No controversy existed, or now exists, between the parties over the distribution of the property, and the only dispute is as to the terms of the agreement between them, after the distribution was ordered and made, whereby it was divided.

Fifth. At the trial, it was stipulated that the District Court and the Supreme Court of Idaho, upon appeal, might take judicial notice of the statutes of Washington and of the decisions of its Supreme Court. The Supreme Court of Idaho held that the statutes of Idaho listed the matters of which the courts could take judicial notice; that neither the statutes nor decisions of other states were included therein, and that the Code prescribed how the laws of other states and foreign countries might be proved. The court reaffirmed the doctrine which has been in force in Idaho for more than twenty-five years, that it will not take judicial notice of the laws of another state, and that in the absence of pleading and proof of what such laws are, they will be presumed to be the same as the Idaho laws.

The court did consider the constitutional and statutory provisions pleaded by the appellant Pelkes in his answer, the existence of which was admitted by respondents, and then held:

(1) That after the order of solvency and the decree of distribution were entered, no other or further order of the court was necessary to pass title or place Pelkes and Mrs. Mason in possession and enjoyment of the property; and that the Superior Court acting in probate had fully performed its functions and exhausted its power.

(2) That Pelkes and Mrs. Mason treated the Sunshine stock in controversy as part of the estate so distributed; brought the certificates, along with other personal property, into the state of Idaho; there entered into an agreement for its division, and divided it, and that the mining stock, having been distributed, was no longer property of the estate and the Washington court sitting in probate did not have jurisdiction over it.

(3) That a court of probate does not have jurisdiction to decide questions of title to the property distributed, arising out of contracts between the distributees after the decree is entered."

And the Supreme Court held against the said appellants and decided that the purported decree or order made after probate in the Superior Court of Spokane County, Washington was not a bar to the action of the plaintiffs.

The said John Pelkes and Evelyn H. Treinies thereupon petitioned the Supreme Court of the United States to grant a [fol. 151] writ of certiorari and petitioned the said Supreme Court of the United States for an injunction and supersedeas pending the determination of said petition for certiorari. Said petition was based upon the ground that the Supreme Court of Idaho had failed, neglected and refused to give full faith and credit to the judgment of a sister state, relying upon the said purported judgment or decree made by the said Superior Court of the State of Washington, in and for the County of Spokane, sitting in probate.

That the petition for certiorari was by the Supreme Court of the United States denied. That the petitioners thereupon asked the court for a stay of mandate in order to file a petition for rehearing, which said motion the Supreme Court denied.

Following the decision of the Supreme Court of Idaho, the said Pelkes and Treinies filed a petition in the Supreme Court of the United States for an injunction and supersedeas pending the determination of the petition for a writ of certiorari and until the final disposition of the said petition for certiorari, or if it be granted, until the final determination of the cause by the Supreme Court of the United States, and restraining Katherine Mason and her husband and their attorneys until final determination of the cause by the Supreme Court of the United States, from selling, assigning, and transferring of record, pledging or otherwise disposing of or encumbering the shares of stock which may have come into their possession pursuant to the decree of the Supreme Court of Idaho, or the decree of the District Court upon mandate therefrom, and an order of injunction and supersedeas was made by a justice of said Supreme Court of the United States upon said petition.

That in the said petition so filed with the Supreme Court [fol. 152] of the United States and in the petition for cer-

tiorari to the Supreme Court of Idaho, the said Pelkes and Treinies asserted that the Supreme Court of the State of Idaho failed and refused to give proper effect to the said pretended final decree of the Supreme Court of the State of Washington in and for the County of Spokane, sitting in probate, and pleaded in bar and abatement in the said Idaho action, which is the identical decree and order under which the said Evelyn H. Treinies; Seattle-First National Bank (Spokane and Eastern Branch) administrator with the will annexed of the estate of John Pelkes, deceased, are claiming in this court; and the said Pelkes and the said Treinies did represent to the Supreme Court of the United States that they had deposited the stock in controversy in the registry of the court in Idaho.

It has therefore been finally adjudicated and determined as against said Evelyn H. Treinies and the Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, that the said so called pretended decree or order of the Superior Court of the State of Washington was not a bar to the maintenance of the Idaho action, nor did it abate the same, nor were the matters therein in issue adjudicated therein, and it has been adjudicated and finally determined as against the defendants and each of them that the said plaintiffs are the owners of and entitled to the possession of the shares of stock and the said money upon a trial of said cause upon the merits. The said adjudication and final determination were had and made in a cause wherein the said Katherine Mason and T. R. Mason, her husband, were plaintiffs and the said Evelyn H. Treinies and John Pelkes were defendants, and wherein the general appearance of said defendants was entered, and that the judgment and decision of the Supreme Court of Idaho was rendered with respect to the said shares so claimed by the said Treinies [fol. 153] and Pelkes. Said shares of stock were deposited by the said Pelkes and Treinies and Sunshine Mining Company in the registry of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and were under the jurisdiction of that court and of the Supreme Court of Idaho and of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, made upon the mandate of the Supreme Court of Idaho, were entered.

That the said Supreme Court of Idaho had jurisdiction of the parties, of the property and of the cause of action, and that it is the identical property which is involved in this controversy and that such decision and adjudication was final and conclusive, except only that the Supreme Court of the United States, if it deemed that the Supreme Court of Idaho had failed to give full faith and credit to the judgment of a sister state, had the jurisdiction and power by certiorari to review said proceedings, and the Supreme Court of the United States refused so to do and said judgment and adjudication is now final and conclusive.

Lester S. Harrison, Kellogg, Idaho; Cox & Ware, Lewiston, Idaho; Richard S. Munter, Spokane, Washington; Walter H. Hanson, F. C. Keane, Wallace, Idaho.

(Duly verified.)

[fol. 154] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BE INSERTED BETWEEN LINES 21 AND 22 ON
PAGE 11 OF THE REPLY AND ANSWER TO CROSS COMPLAINT
OF DEFENDANTS, EVELYN H. TREINIES, ET AL.—Filed May
12, 1937

I

By way of further reply and answer to cross-complaint of defendants, Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, it is alleged:

That in an action begun in the District Court of the First Judicial District of the State of Idaho in and for Shoshone County wherein Katherine Mason and T. R. Mason were plaintiffs and John Pelkes, Evelyn H. Treinies, Sunshine Mining Company, Pierre Thinnes and Francis Thinnes were defendants referred to herein in the answer, reply and cross-complaint of Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, John Pelkes pleaded in the above matter, an order or decree of the Superior Court of Spokane County, Washington, referred to and relied upon by defendants Evelyn H. Treinies

[fol. 155] and Seattle First National Bank (Spokane-Eastern Branch) as administrator with the will annexed in this proceeding. That said then defendant Pelkes pleaded said order or decree in bar of plaintiffs' cause of action and as a prior adjudication of the matters in dispute between the parties in said Idaho action above referred to.

II

That in said action in the District Court of Idaho the said court found and adjudged that said order or decree so pleaded was not a bar and adjudged and decreed that Katherine Mason and T. R. Mason were entitled to 7,649 shares of the capital stock of the Sunshine Mining Company, which had been transferred by the said John Pelkes to Evelyn H. Treinies was the property of the plaintiffs therein and also the dividends thereon and also ordered and decreed that the Sunshine Mining Company recognize the said ownership of said Katherine Mason and T. R. Mason in said stock.

III

That after the entry of said decree so adjudging the ownership of said stock the said Evelyn H. Treinies and John Pelkes feeling aggrieved thereby appealed from said decree as did also the Sunshine Mining Company and the said parties for the purpose of staying execution on said judgment did pursuant to Section 11-205-206-207-208 I. C. A., cause the court to fix the amount of an undertaking necessary to stay execution pending an appeal to the Supreme Court of Idaho from the judgment of the Idaho District Court. That the court fixed the amount of said bond in the sum of Two Hundred Fifty Thousand Dollars (\$250,000) or in lieu thereof authorized a deposit with the clerk of said court of approximately 16,000 shares of stock of the Sunshine Mining Company. That pursuant thereto the said [fol. 156] Evelyn H. Treinies and John Pelkes did for the purpose of staying execution on said judgment cause to be deposited with the said clerk of said Idaho District Court, 15,299 shares of the stock of said Sunshine Mining Company as follows, to-wit:

Certificate No. WN 2849 for 7,600 shares, Certificates Wn 615 for 49 shares, Certificate No. WN 2868 for 7,600 shares, and Certificate No. WN 628 for 50 shares, imme-

diately negotiable to Katherine Mason, and Certificate No. WN 2869 for 701 shares in the name of Evelyn H. Treinies. Said parties also deposited a cash bond to supersede for any dividends past or accruing.

That said deposit was made and authorized by said Evelyn H. Treinies, John Pelkes and Sunshine Mining Company for the purpose of saying execution pending the appeal by said parties to the Supreme Court of the State of Idaho, and the said Treinies and Pelkes did thereby undertake and promise with the said Katherine Mason and T. R. Mason that they would abide the judgment of the said appellate court and agreed that the clerk of said District Court should surrender said stock in accordance with the judgment and decree of said appellate court when remitted. That upon said appeal the said Supreme Court by final judgment and decree decreed that Katherine Mason was and is the owner of 15,299 shares of said stock, together with all dividends thereon. That the said John Pelkes and Evelyn H. Treinies thereupon applied to the Supreme Court of the United States and represented to said last named court, that they had deposited said stock, the ownership of which was in question, in said District Court of the First Judicial District of Idaho as a supersedeas. They thereby agreed and covenanted that they would abide the judgment and thereby stayed execution on said Idaho decree until the final determination of said action. That the said cross defendants, Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, are by the said action of Pelkes and Treinies, in causing said stock to [fol. 157] be so deposited with the Clerk of said District Court of the First Judicial District of Idaho to abide the final decision of said action on appeal, and, their said allegation and showing in the Supreme Court of the United States that they had caused said shares of stock to be so deposited with the Clerk of said District Court for the purpose of assuring that they would abide the final judgment and final decision of the Supreme Court of Idaho are now estopped from now claiming that said Idaho Courts did not have jurisdiction over the said stock or jurisdiction to determine the effect of said order or decree of the Superior Court of the State of Washington in and for Spokane

County by them pleaded in bar and decided adversely to them.

Lester S. Harrison, Kellogg, Idaho; Cox & Ware, Lewiston, Idaho; Richard S. Munter, Spokane, Washington; Walter H. Hanson, F. C. Keane, Wallace, Idaho.

(Duly verified.)

[fol. 158] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDMENTS TO BE INSERTED BETWEEN LINES 17 AND 18, PAGE 23, OF THE CROSS-COMPLAINT AND BETWEEN LINES 21 AND 22 ON PAGE 11 OF THE REPLY AND ANSWER TO CROSS-COMPLAINT OF DEFENDANTS, KATHERINE MASON AND T. R. MASON, WIFE AND HUSBAND; LESTER S. HARRISON AND GRACE G. HARRISON, HUSBAND AND WIFE; WALTER H. HANSON AND EDNA B. HANSON, HUSBAND AND WIFE; AND F. C. KEANE—Filed May 12, 1937

Come now the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and in answer to the affirmative matter contained in the amendment to be inserted between lines 17 and 18, page 23, of the cross-complaint of defendants, Katherine Mason and T. R. Mason, wife and husband; Lester S. Harrison and Grace G. Harrison, husband and wife; Walter H. Hanson and Edna B. Hanson, husband and wife; [fol. 159] and F. C. Keane, and make the following admissions and denials:

They admit it was urged on behalf of Pelkes and Treinies that the decree of the Superior Court of the State of Washington, rendered May 31, 1935, constituted a bar to any proceedings in the action purporting to be pending in the Idaho courts, and that it was further urged in their behalf that the said decree was entitled to full faith and credit under the Constitution of the United States, and that it was further urged that the Idaho court was without jurisdiction of the subject matter presented to it by reason of the said decree, and by reason of the pendency of the probate proceedings in Washington, and they admit that the Supreme Court of Idaho purported to hold that Katherine Mason and T. R. Mason were entitled to 15,299 shares of the capital

stock of the Sunshine Mining Company and to some \$19,000 in money, but they deny that the said court did in effect so hold and decree or that it had any jurisdiction to render any valid decree of any kind whatsoever.

They admit that John Pelkes and Evelyn H. Treinies petitioned the Supreme Court of the United States for a writ of certiorari and for an injunction pending the determination of said petition, and that one of the grounds of the petition was that the Supreme Court of Idaho had failed to give full faith and credit to the judgment of the Superior Court of the State of Washington for Spokane County, and that said petition was denied, and that a petition for rehearing was filed and also denied.

They deny each and every other matter and thing therein alleged save only in so far as any of those allegations may [fol. 160] have been heretofore expressly admitted in the answer, reply and cross-complaint filed by defendants herein, or save in so far as any of those allegations may hereafter be expressly admitted in the affirmative matter set out herein.

Come now the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and in answer to the affirmative matter contained in the amendment to be inserted between lines 21 and 22 on page 11 of the reply and answer to cross-complaint of defendants, Katherine Mason and T. R. Mason, wife and husband; Lester S. Harrison and Grace G. Harrison, husband and wife; Walter H. Hanson and Edna B. Hanson, husband and wife; and F. C. Keane, make the following admissions and denials:

They admit it was urged on behalf of Pelkes and Treinies that the decree of the Superior Court of the State of Washington, rendered May 31, 1935, constituted a bar to any proceedings in the action purporting to be pending in the Idaho courts, and that it was further urged in their behalf that the said decree was entitled to full faith and credit under the Constitution of the United States, and that it was further urged that the Idaho court was without jurisdiction of the subject matter presented to it by reason of the said decree, and by reason of the pendency of the probate proceedings in Washington, and they admit that the Supreme Court of Idaho purported to hold that Katherine Mason and T. R. Mason were entitled to 15,299 shares of the capital

stock of the Sunshine Mining Company and to some \$19,000 [fol. 161] in money, but they deny that the said court did in effect so hold and decree or that it had any jurisdiction to render any valid decree of any kind whatsoever.

They admit that John Pelkes and Evelyn H. Treinies petitioned the Supreme Court of the United States for a writ of certiorari and for an injunction pending the determination of said petition, and that one of the grounds of the petition was that the Supreme Court of Idaho had failed to give full faith and credit to the judgment of the Superior Court of the State of Washington for Spokane County, and that said petition was denied, and that a petition for rehearing was filed and also denied.

They deny each and every other matter and thing therein alleged save only in so far as any of those allegations may have been heretofore expressly admitted in the answer, reply and cross-complaint filed by defendants herein, or save in so far as any of those allegations may hereafter be expressly admitted in the affirmative matter set out herein.

Come now the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch) administrator with the will annexed of the estate of John Pelkes, deceased, and allege:

That upon the handing down of the purported decision of the Supreme Court of Idaho, these defendants applied to the Supreme Court of the United States for a writ of certiorari and further applied for an injunction and restraining order and that it was essential that these applications be speedily addressed to one of the justices of that court, [fol. 162] and that thereupon these defendants employed one Webster Ballinger, admitted to practice before the said court, to make such applications in their behalf, and that for the purpose of making said applications, counsel representing said defendants who were then in Spokane, Washington, telephoned the said Webster Ballinger by longdistance in Washington, D. C., and endeavored to give him a general understanding of the litigation and its condition at that time.

That the said Webster Ballinger erroneously believed that the defendants had deposited the stock of the Sunshine Mining Company in the registry of the court, and therefore so alleged, but that this was not the fact and that the said defendants have at all times refused to recognize the jurisdiction of the courts of Idaho or to bring the stock, or the

certificate evidencing it, within the jurisdiction of or deposit in the registry of the Supreme Court of Idaho, and that the said Webster Ballinger was mistaken as to the facts and that such mistake arose from the method of communicating with him and the haste necessary under the circumstances.

That although defendants Katherine Mason and T. R. Mason knew that the averment of the said Webster Ballinger was a mistake of fact they took no steps to call it to the attention of the Supreme Court of the United States, or in any wise to refute it, although they had the right so to do, and that this blunder was not called to the attention of these defendants or their counsel until raised in the amendments to which this affirmative matter is directed.

H. J. Hull, Graves, Kizer & Graves, Attorneys for defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane & Eastern Branch), Administrator with the Will Annexed of the Estate of John Pelkes, Deceased.

(Duly verified.)

[fol. 163] IN UNITED STATES DISTRICT COURT

REPLY OF SUNSHINE MINING COMPANY TO AMENDMENTS OF THE CROSS-COMPLAINT OF DEFENDANTS, KATHERINE MASON AND T. R. MASON, WIFE AND HUSBAND; LESTER S. HARRISON AND GRACE G. HARRISON, HUSBAND AND WIFE; WALTER H. HANSON AND EDNA B. HANSON, HUSBAND AND WIFE, AND F. C. KEANE—Filed May 14, 1937

Comes now the plaintiff, Sunshine Mining Company, and, for reply to the amendment to be inserted between lines 17 and 18, page 23, of the cross-complaint of defendants, Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, admits, denies and alleges as follows:

1

For reply to said amendment hereinabove referred to, said plaintiff alleges that it has no information or knowledge sufficient to form a belief as to the truth thereof and,

therefore, denies said amendment and each and every allegation therein contained except insofar as the same is expressly admitted by the allegations contained in plaintiff's complaint.

By way of reply to the amendment to be inserted between lines 21 and 22, page 11 of the reply and answer to cross-complaint of defendants, Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, plaintiff alleges as follows:

1

For reply to said amendment hereinabove referred to, said plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof and, therefore, denies all of said paragraphs 1, 2 and 3 contained in said amendment, except insofar as the same is expressly admitted by the allegations contained in plaintiff's complaint.

Wherefore, plaintiff, having fully replied to the said amendments of said defendants above mentioned, prays for judgment in accordance with the prayer contained in its bill of interpleader.

[fol. 164] Nat U. Brown, C. W. Halverson, James E. Gyde, James E. Gyde, Jr., Solicitors for Plaintiff.

(Duly verified.)

(Service Accepted.)

[fol. 165] IN UNITED STATES DISTRICT COURT

ORDER REQUIRING DEFENDANTS TO DELIVER STOCK AND DEPOSIT FUNDS INTO REGISTRY OF COURT, AND RESTRAINING ORDER—Filed May 15, 1937

This matter having come on duly and regularly for hearing before the above entitled Court, the plaintiff appearing by its attorneys of record, and the defendant Evelyn H. Treinies and Seattle First National Bank (Spokane and Eastern Branch) administrator with the will annexed of the estate of John Pelkes deceased, appearing by their at-

torneys of record, and Katherine Mason and T. R. Mason, Grace G. Harrison and Jane Doe Hanson appearing by their attorneys of record and Lester S. Harrison, Walter H. Hanson and F. C. Keane appearing in person, and A. W. Hawkins, as the duly elected, qualified and acting Judge of the Superior Court of the State of Washington in and for Yakima County, and J. C. Cheney as Receiver, appearing by their respective pleadings on file herein, and the plaintiff having duly moved for an Order requiring said defendants to deposit into the registry of the above entitled Court the following, to-wit: Certificate for sixteen thousand (16,000) shares of stock of the Sunshine Mining Company issued to and standing in the name of Evelyn H. Treinies, [fol. 166] and the certificates for fifteen thousand two hundred ninety-nine (15,299) shares of the Sunshine Mining Company stock, and the shares evidenced thereby, issued to and standing in the name of Katherine Mason, together with the sum of \$42,225.24 heretofore paid by the plaintiff to Katherine Mason as dividends on said fifteen thousand two hundred ninety-nine (15,299) shares of stock, and it appearing to the Court from the records, files and proceedings had herein that Evelyn H. Treinies and Seattle First National Bank (Spokane and Eastern Branch) as Administrator of the estate of John Pelkes deceased, and their attorneys of record are in possession of said certificate for said sixteen thousand (16,000) shares of stock, and that said Katherine Mason and T. R. Mason, and their attorneys of record are in possession of said fifteen thousand two hundred ninety-nine (15,299) shares of stock and the \$42,225.24 in dividends paid thereon, and the Court having heard arguments of counsel and being fully advised in the premises;

Now, Therefore, It is Ordered, Adjudged and Decreed that the said Evelyn H. Treinies and the Seattle First National Bank, (Spokane and Eastern Branch) as administrator of the estate of John Pelkes, deceased, and their attorneys of Record herein and each of them be and they are hereby Ordered to deposit in the registry of the above entitled Court on or before the 25 day of May 1937, certificate for sixteen thousand (16,000) shares of stock of the Sunshine Mining Company, issued to and standing in the name of Evelyn H. Treinies, and

It is Further Ordered, Adjudged and Decreed, that the defendants Katherine Mason and T. R. Mason, and their

attorneys of Record herein and each of them be and they are hereby Ordered to deposit into the registry of the above entitled Court on or before the 25 day of May 1937, certificates for fifteen thousand two hundred ninety-nine (15,299) shares of stock of the Sunshine Mining Company and the shares evidenced thereby, issued to and standing in the name of Katherine Mason, and the sum of \$42,225.24 in cash, being the dividends heretofore paid by the plaintiff on the said 15,299 shares of said stock, and it is further Ordered, Adjudged and Decreed that all of said property heretofore described shall be held in the registry of the above entitled Court subject to the further Order of the Court and pending final determination of the above entitled action, and

The Sunshine Mining Company is hereby Ordered to deposit with the Clerk of this Court, as a part of its interpleader, and subject to disposition by the final judgment of this Court, all dividends accrued and accruing on the remaining of the full amount of the 16,000 shares of stock of the Sunshine Mining Company concerning which the title or liens thereon are in dispute as between the parties defendant herein, and

It is Further Ordered, Adjudged and Decreed, that the Sheriff of Shoshone County, Idaho be and he is hereby enjoined and restrained from selling, disposing or in any way transferring any of the certificates of stock now in his possession evidencing 701 shares of stock in the Sunshine Mining Company until further Order of the above entitled Court. To all of which parties adversely affected except and their exception is hereby allowed.

Dated this 15th day of May, 1937.

Charles C. Cavanah, United States District Judge.

[fol. 168] IN UNITED STATES DISTRICT COURT

Narrative Statement of Evidence—Filed December 4, 1937

The matter came on for hearing on April 8, 1937 before the Court at Boise, Idaho, on the return day, requiring all the defendants to show cause why they should not be enjoined pending the action from transferring or disposing of, or attempting to transfer any stock of the Sunshine Mining Company involved in the litigation, or from proceed-

ing in any court with reference to the subject matter of the action pending the litigation. The Sunshine Mining Company, plaintiff, appeared by its counsel C. W. Halverson; the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes deceased, appeared through their counsel B. H. Kizer and Paul H. Graves; defendants Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and wife, Walter H. Hanson and wife and F. C. Keane appeared through their [fol. 169] counsel Eugene A. Cox and Richard S. Munter, defendants Lester S. Harrison and Walter H. Hanson and F. C. Keane appearing also personally; defendant A. W. Lawkins filed a return in propria persona but did not appear personally; and defendant J. C. Cheney, as receiver, filed a return in propria persona but did not appear personally. Oral and documentary evidence was taken pursuant to order of the Court.

[fol. 170] Mr. Halverson, solicitor for the interpleader then offered in evidence exhibit 5, an exemplified copy of the decree of distribution, findings of the Court and order approving partition, order correcting receipts for distributive shares and discharge of executor, entered in the Superior Court of Spokane County, Washington, "In the Matter of the Estate of Amelia Pelkes, Deceased," being Cause No. 15,496. Exhibit 5 was admitted without objection. The decree of distribution, being part of exhibit No. 5 is as follows:

EXHIBIT No. 5

DECREE OF DISTRIBUTION

John Pelkes, the executor of the estate of Amelia Pelkes, deceased, having on the 12th day of July, 1923, filed in this court his final report and petition for distribution setting forth, among other matters that said estate is in a condition to be closed, and that portion of said estate remains to be divided among the heirs of said deceased, and said matter coming on regularly to be heard the 9th day of August, 1923 at 10 o'clock A. M. the said executor appearing by Frank H. Kinsell counsel this Court proceeded to the hearing of said petition and, It Now Appearing, to the satisfaction of this court that the residue of said estate, consisting of the property hereinafter particularly de-

scribed, is now ready for distribution, and that said estate is now in a condition to be closed; and that all persons interested in this estate have had due notice of this hearing as required by law.

That the whole of said estate is community property.

That the said Amelia Pelkes died, testate, at Spokane, in the County of Spokane, State of Washington, on the 24th day of April 1922; leaving a community interest, being an undivided $\frac{1}{2}$ interest in and to the property described and set forth in the general inventory and supplemental inventory on file herein, and John Pelkes, husband, Spokane, Wash., and Katherine Mason, daughter, Kellogg, Idaho, the only heirs, legatees and devisees of said deceased.

That the final report and account therein contained has been examined by this court and found correct, and the same is hereby approved and allowed.

That since the rendition of his said final account, nothing has come into the hands of the said executor and nothing has been expended by the said executor as necessary expenses of administration, and that the estimated expenses of closing said estate will amount to the sum of Four Dollars and forty-five cents.

Now, on this, the said 9th day of August 1923, on motion of Frank H. Kinsell, Esq., counsel for said executor.

It is Hereby Ordered, Adjudged and Decreed, That the residue of said estate of Amelia Pelkes deceased, herein-after particularly described and now remaining in the hands [fol. 172] of said executor and any other property not now known or described which may belong to said estate, or in which the said estate may have any interest be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit:

John Pelkes, husband, Spokane, Washington, an undivided one-half interest thereof; Katherine Mason, daughter, Kellogg, Idaho, an undivided one-half interest thereof.

By this decree the said John Pelkes becomes the owner of an undivided three-fourths interest in the property described in the inventories on file herein, or the proceeds thereof, and the said Katherine Mason becomes the owner of the remaining one-fourth interest, undivided, in said property, the said John Pelkes being the owner of a community or undivided one-half interest of said property of the time of the death of his wife the said Amelia Pelkes.

The following is a particular description of said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, as aforesaid, to-wit:

E. 132 feet lots 1 and 2, Block 7 of Stratton's addition to Spokane, Washington, appraised value \$2,750.00.

Lot 4 in Block 56 Muzzy's addition to Spokane, Washington, unpaid balance on said contract \$1,640.00 I. O. O. F. promissory note described in inventory, \$1,000.00

T. R. Mason Promissory note, described in inventory, [fols. 173-174] \$1,000.00.

John Byrne & Wife mortgage, described in inventory \$10,000.00

Bonds of Interstate Utilities Company, also called Interstate Telephone Company bonds, 6000 shares, of the appraised value of \$5,100.00.

Cash on hand, \$10,024.33.

It is Further Ordered, That said executor deliver the said estate to the beneficiaries above named and file his receipt therefor in this Court.

Done in open Court this 9th day of August 1923.

Hugo E. Oswald, Judge.

Filed Aug. 9, 1923, John Gifford, Clerk, N. Paulsen, Deputy.

[fol. 175]

STIPULATION

It was then stipulated that the merits would be tried at Moscow, Idaho, on May 14, 1937, and that the temporary injunction previously issued should continue in effect.

Trial on the Merits

Court convened at Moscow, Idaho, on May 14, 1937 to hear the matter upon the merits. The parties appeared by the same counsel as had appeared at the hearing upon the show cause order at Boise.

The following oral stipulation was made in open Court:

STIPULATION

"It is stipulated that the parties agree that all of the evidence introduced at the hearing on the order to show

cause at Boise may be considered upon and considered as introduced upon the trial, subject to the objections, exceptions and admissions made."

No ruling was made by the court upon the individual exhibits so referred to but the substance of the same as considered material by the court follows:

EXHIBIT No. 1

A Complaint filed by Katherine Mason and T. R. Mason in the District Court of Idaho for Shoshone County on August 4, 1934, naming as defendants John Pelkes, Evelyn H. Treinies, the Sunshine Mining Company and two other defendants, Pierre Thinnies and his wife, who the files show were later in the case dismissed, the material allegations of which (omitting the formal portions) were in substance as follows:

COMPLAINT

That Amelia Pelkes was the wife of John Pelkes and that the said Amelia Pelkes died on the 24th of April 1922, the two of them being residents of Spokane County, Washington, [fol. 176] and leaving as her sole heirs her daughter, Katherine Mason and her husband, John Pelkes. That at the time of the death of the said Amelia Pelkes she and her husband were owners of 30,598 shares of the capital stock of the Sunshine Mining Company as community property.

That subsequent to the 24th of April 1922, the estate of Amelia Pelkes was probated in the Superior Court of Spokane County, Washington and a settlement of all the assets belonging to the estate was had between John Pelkes and the plaintiff Katherine Mason under the terms of which settlement between the parties each of them became the owner of a half interest in 30,598 shares of Sunshine Mining Co., capital stock, it being orally agreed by and between the defendant John Pelkes and the plaintiff Katherine Mason on or about the 8th day of August, 1923, that the said defendant John Pelkes would hold title to plaintiff Katherine Mason's half interest therein and that he would secure a division of the certificate so as to give Plaintiff Katherine Mason her half interest in the certificate upon demand, if and when the said capital stock would be of any value, and he

further agreed to account for and to pay to plaintiff Katherine Mason any dividends which might be paid upon said capital stock.

Complaint further alleged that at that time the shares were of practically no value except a prospective value, thereafter the said shares became valuable, a considerable sum in dividends was paid thereon and that John Pelkes on divers occasions promised he would hold the said stock until it became more valuable and that he (Pelkes) would at the proper time turn such shares of capital stock, to-[fol. 177] gether with accrued dividends over to Katherine Mason and that, relying upon said promises, she had permitted Pelkes to retain possession of and legal title to her 15,299 shares of stock.

After alleging that Pelkes had in violation of his trust, and with intent to defraud plaintiff Katherine Mason, transferred a portion of said shares to Pierre Thinnes who with his wife was joined in the action and later dismissed, the complaint continued:

That John Pelkes on the 13th day of November, 1933, transferred 16,000 shares of the capital stock of the Sunshine Mining Company to the defendant Evelyn H. Treinies, said transfer being made with fraudulent intent and purpose on his part to defraud plaintiffs of their interest, and that the transfer was without consideration. That the said transfer was made to Evelyn Treinies for the purpose of defeating and defrauding plaintiffs and with knowledge on her part that Pelkes was holding a one half interest in all the shares of the capital stock in trust for plaintiff Katherine Mason.

That the fact of such transfer had just been called to the attention of the plaintiffs and that they had no previous knowledge thereof until a few days prior to the commencement of the action.

Complaint then alleged that large sums had been paid as dividends to the defendants Thinnes and Treinies but that the exact amount was unknown to plaintiffs and that plaintiffs were entitled to require the defendants Pelkes, Thinnes and Treinies to account for such dividends.

That plaintiffs were informed and believed that unless the defendants were restrained and enjoined from transferring the shares, they would cause the certificates to be sold and placed in the hands of innocent holders and thereby

[fol. 178] prevent plaintiffs from securing the property which rightfully belongs to them, and that Sunshine Mining Company would, unless restrained and enjoined, permit transfer of said shares to be made on its books and pay dividends thereon, and that it was necessary that the Sunshine Mining Company be restrained from transferring said shares upon its books and that plaintiffs had no plain, speedy or adequate remedy of law, and therefore invoked the equitable jurisdiction of the court.

Plaintiffs prayed:

1. For a decree ordering, adjudging and decreeing Katherine Mason to be the owner of 15,299 shares of capital stock of the Sunshine Mining Company, and that the defendant John Pelkes had held such shares in trust for Katherine Mason.

2. For a decree ordering, adjudging and decreeing that the transfer of said stock to Thinnes and Treinies was fraudulent and without any consideration and in direct violation of the trust imposed upon John Pelkes, and setting aside such transfers, and subjecting the stock and the whole thereof to the settlement of plaintiffs' rights.

3. That defendants Thinnes and Treinies be enjoined and restrained from in any way selling or disposing of said stock pending a final determination of the action.

4. That the defendant Sunshine Mining Company be enjoined and restrained pending the action from permitting transfer of said shares or paying any dividends thereon.

5. That an order be issued requiring each of the defendants to appear at a time and place fixed by the Court and show cause why they should not be restrained and enjoined from in any way disposing of or transferring said shares pending the action and why the Sunshine Mining Company [fol. 179] should not be enjoined from paying any dividends thereon pending the action, and that pending such hearing they all be restrained from so doing.

6. For a decree ordering and directing each of the defendants to account to the plaintiffs for the dividends and that the shares in question held by the defendants be subjected to the payment of the dividends which had previously accrued.

7. For a decree directing defendant Sunshine Mining Company to cancel certificate standing in the names of Pierre Thinnes and Evelyn H. Treinies, and directing it to issue to plaintiffs a certificate in lieu thereof.

8. For such other and further relief as to the Court may seem just and equitable.

ANSWER OF JOHN PELKES

An answer was filed by John Pelkes on February 13, 1935, the material allegations of which (omitting the formal portions) are in substance as follows:

That the two plaintiffs were husband and wife; the Sunshine Mining Company, a Washington corporation, qualified by the State of Idaho; and John Pelkes and Amelia Pelkes were husband and wife. That Amelia Pelkes dies April 24, 1922, leaving surviving her daughter, Katherine Mason, the plaintiff, and her husband, John Pelkes, the defendant, as her sole heirs and that John and Amelia Pelkes became the owners of 30,598 shares of the capital stock of the Sunshine Mining Company as their community property during their lives.

VI. Answering paragraph 6 John Pelkes admits that subsequent to April 24, 1922, probate proceedings were instituted with respect to the estate of Amelia Pelkes in [fol. 180] the Superior Court of Washington for Spokane County, and admitted that a settlement of all assets of the Amelia Pelkes estate was had between Katherine Mason and defendant John Pelkes, but denied that under the terms of such settlement Katherine Mason became the owner of a one half interest in 30,598 shares of the Sunshine Mining Company's capital stock, or in any part thereof, denying the oral agreement alleged in the complaint whereby he was to hold title for the plaintiff of her one half interest in trust. Defendant John Pelkes denied that he agreed to secure a division of the certificate in order to give Katherine Mason her half interest at any time or place, or agreed to give or account to plaintiff for the dividends.

VII. Defendant admitted that on August 8, 1923 shares of the Sunshine Mining Company were of practically no value and admits thereafter it became valuable and that a considerable sum in dividends was paid thereon. He denied

he had promised Katherine Mason he would hold the stock until it became valuable or that he would make any money out of it for her. He denied that he stated or agreed at any time that he would turn over the shares to her, together with accrued dividends, and denied she relied upon the alleged promises and denied that she permitted him to retain possession of and legal title to the shares, and denied that she was at any time the owner of 15,299 shares referred to in the complaint or any part thereof.

VIII. Defendant denied all allegations of paragraph 8 of complaint except that he admits transferring 12,000 shares to Pierre Thinnes his nephew but denies the transfer was made wrongfully or fraudulently or in defiance of the rights of plaintiff, or in violation of any trust.

[fol. 181] IX. Defendant admitted about November 13, 1933 he transferred 16,000 shares to Evelyn Treinies, and denied specifically that it was done with any fraudulent intent or for the purpose of defrauding plaintiffs, and denied the transfer was without consideration. He denied the transfer was accepted by Evelyn Treinies for the purpose of defeating and defrauding plaintiffs or with any knowledge that there was any trust in connection with said stock, and affirmatively alleged that at no time did he hold the stock or any part thereof in trust for either of the plaintiffs.

X. He denied that their attention has just been called to such transfer as alleged in paragraph 10 of complaint.

XI. Defendant admitted dividends had been paid on said shares to himself, to Evelyn Treinies and to Pierre Thinnes but denied plaintiffs had any right to require the defendants or any of them to account for any dividends.

XII. Defendant denied all the allegations of paragraph 12 of the complaint which are to the effect that unless they were restrained and enjoined the said shares would be transferred.

XIII. Defendant denied all allegations of paragraph 13 which are to the effect that Sunshine Mining Company unless enjoined will transfer said shares upon its books.

XIV. Defendant denied all allegations of paragraph 14 of the complaint.

As a First Affirmative Defense the defendant John Pelkes alleged certain other things and later on June 14, 1935 by leave of the court, his five affirmative defenses were amended, [fol. 182] the material allegations of which are in substance as follows:

First Affirmative Defense—Defendant alleged:

I. That his wife Amelia, the mother of Katherine Mason by previous marriage, died April 24, 1922, leaving only community property and that she and the defendant were residents of Spokane County, Washington, at the time.

II. That Amelia Pelkes left a will whereby she devised to the defendant John Pelkes half of her community interest in the property and half to Katherine Mason, naming her husband John Pelkes, the defendant, as executor under a non-intervention will.

III. Defendant pleaded Section 1342 of Remington's Compiled Statutes of Washington, 1922, now Section 1342 of Remington's Revised Statutes of Washington, setting same out in full.

IV. Defendant alleged that subsequent to the death of Amelia Pelkes he caused her will to be filed for Probate in the Superior Court of the State of Washington for Spokane County and letters testamentary to be issued to him. After due proceedings on the 9th of August, 1923 final account and report of the defendant as executor was duly settled and approved and a decree of distribution entered therein, wherein it was ordered and directed that one half of the community interest of Amelia Pelkes be distributed to the defendant and one half thereof to plaintiff Katherine Mason, and defendant then quoted a portion of the decree which is included in exhibit 11 in this action and later herein referred to; he further alleged that the total value of the residue of the community property as shown by the final account and the decree of distribution was \$31,514.33, and that Katherine Mason became entitled to one quarter thereof [fol. 183] or property of the value of \$7,878.58, and John Pelkes entitled to three-quarters.

V. Defendant alleged that at the time of the death of Amelia Pelkes, and on the date of the distribution of said estate as aforesaid, he was the owner of 30,598 shares of the capital stock of the Sunshine Mining Company together with

substantial amounts of stock in the Riverside Copper Mining Company Ltd, and the Teddy Mining Co., Ltd. and the Little North Fork Copper Mining and Milling Co., that the said stock had no value at that time and were subject to assessment and were omitted from the inventory of the estate of Amelia Pelkes with the knowledge and consent of Katherine Mason for the reason that the same were of little or no value.

VI. He alleged upon entry of said decree of final distribution defendant discussed settlement with Katherine Mason of their respective interests in the estate and that they agreed upon a distribution and division whereby he retained all of the mining stocks referred to in the last preceding paragraph, together with certain real estate in the City of Spokane, Washington, and that pursuant to the agreement, Katherine Mason agreed to take and receive in her own right the following property :

John Byrne Mortgage—value \$10,000

Bonds of Interstate Utilities Co., value \$5,100

Promissory note of T. R. Mason, her husband \$1,000

and he thereupon delivered to her the said property and she accepted the same in full settlement of all her right and interest in the estate of Amelia Pelkes, and that neither Katherine Mason nor T. R. Mason have any right, title or interest in the Sunshine Mining Company stock or in the dividends or earnings thereof.

[fol. 184] For a Second Affirmative Defense defendant alleged :

I. That many years prior to the death of his wife Amelia Pelkes he acquired a substantial interest in the Yankee Girl Group of lode mining claims in Shoshone County, Idaho, approximately six miles from Kellogg where Katherine and T. R. Mason, the plaintiffs, at all times resided. That in the year 1920 title to the Yankee Girl group was acquired by the Sunshine Mining Company and the defendant received 30,598 shares of the capital stock of the Sunshine Mining Company for his interest, which fact was well known to plaintiffs. That subsequent to the death of Amelia Pelkes, on August 9, 1923, the residue of the estate was divided between defendant Pelkes and plaintiff Katherine Mason as alleged in the first affirmative defense. That after the death of

Amelia Pelkes and until the year 1926 defendant made his home with plaintiffs Katherine and T. R. Mason and at all such times exercised full rights of ownership of the stock and dealt with the same as his own.

II. The defendant alleged that the property of the Sunshine Mining Company was in the course of development in 1920 and has become very valuable. That in the early years its stock was frequently quoted in a newspaper circulated through Coeur d'Alene mining district and that by the year 1927 its price had gone to \$7 per share and that it paid dividends every year after 1927. That at the time defendant conveyed the 16,000 shares to Evelyn Treinies the stock had a market value of approximately 80¢ per share. He further alleged that prior to 1920, and ever since, plaintiffs had lived at Kellogg, within four miles of the Sunshine Mine. That the said City is in a mining community. That [fol. 185] plaintiff T. R. Mason was a physician with wide public experience and acquaintance and both he and his wife were familiar with the Sunshine Mining Co. and had dealt in its stock; that T. R. Mason on May 27, 1920, became the owner of 27,733 shares of the Sunshine stock but sold the same in 1926 for 40¢ a share and advised defendant to sell his. That plaintiffs have at all times known that dividends were being paid on the stock.

III. That at all times after the year 1927 and until he transferred the stock the defendant had personally received dividends thereon and at no time did the plaintiffs prior to the filing of the suit, make any claim or demand for the dividends.

IV. Defendant alleged plaintiffs knew of his transfer of the shares to Thinnies and his wife.

V. That in the year 1931 he was approximately 78 years of age and had physical infirmities and had no permanent home but was residing in Hotels. That at that time he entered into an agreement with his niece, the defendant Evelyn Treinies, whereby he conveyed to her certain real estate in the City of Kellogg and 16,000 shares of the stock of the Sunshine Mining Company in consideration of her agreeing to support and maintain him for the remainder of his life. The said agreement was reduced to writing and is attached to the answer, marked exhibit A. That pursuant to said agreement he conveyed certain real estate in Kellogg, Idaho, by deed

which deed was recorded in the public records and transferred 16,000 shares of the capital stock of the Sunshine Mining Company to Evelyn Treinies. That his niece Evelyn Treinies abandoned a profitable business in which she was engaged and ever since January 1931 has devoted her entire time and attention to his care and comfort and has been his constant companion.

[fol. 186] VI. That notwithstanding the fact that Katherine and T. R. Mason knew these things they made no demand for transfer of said stock or for the dividends thereon.

VII. That by reason of the foregoing facts plaintiffs were guilty of laches.

For Third Affirmative Defense he readopted the second affirmative defense and further alleged:

II. That the action was barred by the statute of limitations.

III. That the subject matter of the action, to-wit the 30,598 shares of the capital stock of the Sunshine Mining Company is and at all times since prior to August 1923 has been in the jurisdiction of the courts of the State of Washington and that the cause of action alleged in the complaint is barred by the statute of limitations of Washington, defendant setting out sections 155 and 159 of Remington's Revised Statutes of Washington.

For Fourth Affirmative Defense defendant alleged that this is an action in rem and that the court had no jurisdiction of the res or the subject matter of the action.

For Fifth Affirmative Defense defendant alleged:

I. That during the lifetime of his wife they were residents of the States of Idaho and Washington; that plaintiff Katherine Mason is the daughter of Amelia Pelkes by a former marriage; and that the shares of the Sunshine Mining Company were community property of the defendant John Pelkes and Amelia Pelkes, his wife.

II. That at the time of the death of Amelia Pelkes they were both residents of Spokane County, Washington, where she died and where the major portion if not all of the community property was located. That by her will Amelia

Pelkes devised to her husband and to her daughter Katherine [fol. 187] Mason, her property of every sort whatsoever and wheresoever in equal shares and that the said will was presented to and admitted to probate in the Superior Court of the State of Washington for Spokane County, which Court by the laws of the State of Washington was accorded general jurisdiction and endowed by its laws with primary and exclusive jurisdiction of the probate of wills and administration of estates, and that the administration of the estate of Amelia Pelkes had since proceeded under the administration and jurisdiction of the orders of that court.

III. The Sunshine Mining Company, whose shares are referred to in the complaint and are the subject matter of this litigation, is a corporation organized and existing under the laws of the State of Washington. Those shares constituted a part of the estate of Amelia Pelkes which passed under her will and were subject to administration by the Superior Court of the State of Washington for Spokane County by virtue of the probate proceedings instituted therein. During the period of the administration and for some years thereafter those shares and a great number of shares of other mining companies which were a part of Amelia Pelkes' estate had no market value and were deemed by this defendant and Katherine Mason alike to be valueless save for some intangible and uncertain speculative value. For that reason they thought it unnecessary to administer upon the shares, and the shares were not included in the inventory of the property of the estate, or administered upon, or referred to in the administration proceedings.

IV. That on July 12, 1923, the defendant filed his final report and account of administration and prayed that the same be settled and the estate distributed. On August 9, 1923, said Court made and entered a decree of distribution [fol. 188] that the whole of the estate was community property; that Amelia Pelkes dies testate leaving a community interest and that the defendant John Pelkes, her husband, and Katherine Mason, her daughter, were the only heirs, legatees and devisees; that the final report and account was correct, approved and allowed; that the property of the estate be distributed to and vested in equal shares in said John Pelkes and Katherine Mason—and quoted a portion of the decree of distribution, exhibit 11 in this action.

V. Defendant alleged that at the time this occurred the defendant was about 70 years of age and Katherine Mason about 43 years of age. That she had since 8 years of age been treated as a daughter of defendant; that at the time of the decree of distribution plaintiff and defendant discussed affairs of the estate and it was agreed that instead of receiving an undivided one half interest in the property described in the decree, she should take in her own right and free from any claim, the following:

John Byrne Mortgage, value \$10,000; Bonds of Interstate Utilities Co., value \$5,100; and promissory note of T. R. Mason, \$1,000.

Under this agreement in consideration of receiving the aforesaid property in her sole and undivided right, she released her claim upon any right or interest in the remaining property described in the decree of distribution and as well upon any right, claim or interest in the shares of stock in mining companies, which were a part of the estate of Amelia Pelkes, although not inventoried or administered upon because of their supposed valuelessness. Included in such stock were the shares of stock in the Sunshine Mining Company. It was also expressly agreed that Katherine Mason should not have or take any right, title or interest in said [fol. 189] shares but they should become the sole property of this defendant. Said agreement was performed by both parties thereto.

VI. That the value of the entire estate was approximately \$32,000 and that Katherine Mason under the will of Amelia Pelkes and by the decree of distribution became entitled to property of the value of \$8,000 but by the agreement between them, she received property of the value in excess of \$16,000 and that defendant did not take any receipt from Katherine Mason for the property she received and did not obtain an order of discharge of the executor because of his ignorance of the law and his entire trust in Katherine Mason.

VII. That several years after these occurrences the Sunshine Mining Company's stock began to have a substantial value and in 1927 the Company began to pay dividends. That in the year 1934 the Masons, moved by the great increase in the value of the stock, laid claim to an interest therein and instituted the action.

After the action was commenced, Katherine Mason, acting through the same attorneys employed in the Idaho action and additional counsel in Spokane, Washington, instituted a proceeding in the Superior Court of the State of Washington for Spokane County, "In the Matter of the Estate of Amelia Pelkes, Deceased," being No. 15,496, the action in which the will of Amelia Pelkes was presented for probate. Defendant then set up in detail the petition filed by Katherine Mason "In the Matter of the Estate of Amelia Pelkes, Deceased" in Spokane County, which alleged that defendant Pelkes had not inventoried or administered upon all the property but had wasted and embezzled the same and prayed for his removal and the appointment of an administrator c. t. a., which petition is a part of exhibit 11 [fol. 190] in this action and herein further set out, and also a part of exhibit No. 22, the transcript in the Supreme Court of the United States on petition of John Pelkes and Evelyn H. Treinies for writ of certiorari to the Supreme Court of the State Idaho, defendants Masons' exhibit No. 22 in this action.

VIII. Defendant alleged the citation issued out of the Superior Court of the State of Washington for Spokane County and served upon him, which is set out in exhibit 11 in the instant action and later in this statement referred to. Defendant Pelkes further alleged that issue was joined on his petition of Katherine Mason and after an extended controversy, resulted in a motion of Katherine Mason to dismiss her petition and withdraw her charges, and that the superior Court had indicated it would upon certain conditions, to-wit; the payment of costs, including costs between attorney and client, grant said petition to dismiss.

IX. That upon the superior Court's indicating it would grant the petition to dismiss, defendant Pelkes filed a petition praying that Katherine Mason be required to give her receipt for her distributive share so that an order discharging John Pelkes as executor could be issued by the Court and the defendant referred to exhibit attached thereto, being the said petition, order and judgment of the Superior Court of Spokane County, Washington found in exhibits 11, 12 and 13 in the instant action and letter herein referred to. Said petition referred to the stock of the Sunshine Mining Company; the probate of the will of Amelia Pelkes; the Decree of Distribution and the ensuing litigation in Idaho

and said petition and order of the Superior Court of Spokane County, Washington being the same petition and order introduced as part of exhibit "E" in the said cause in the District Court of the First Judicial District of the State of [fol. 191] Idaho, wherein Katherine Mason and T. R. Mason were plaintiffs and John Pelkes and Evelyn H. Treinies and others were defendants and appearing as part of the record in the Supreme Court of the United States, upon petition for writ of certiorari to the Supreme Court of the State of Idaho in the cause wherein John Pelkes and Evelyn H. Treinies were petitioners against Katherine Mason and T. R. Mason, her husband, and hereinafter found, as a part of said transcript of record, defendants' exhibit No. 22.

X. That the Superior Court of the State of Washington was a court of exclusive jurisdiction to administer the estate of decedents resident therein or leaving an estate therein and specifically plead sections of the Constitution of the State of Washington, together with codes as to the jurisdiction of Superior Courts. He further plead that Amelia Pelkes was a resident of Spokane County, Washington at the time of her death and all, or substantially all of her estate was situated in Spokane County and that the Superior Court of the State of Washington for Spokane County, upon the institution of proceedings, was possessed of exclusive jurisdiction of the proceedings in the matter of her estate and the same was finally closed by the approval of receipts and a final discharge of the executor.

He further plead that under the laws of Washington the administration of an estate is not completed with the entry of a decree of distribution nor with a distribution thereunder but it is essential that receipts be filed and approved by the Court and an order made closing the estate and discharging the executor. Where, by an agreement between executor or administrator, of the one part and the beneficiaries or distributees, of the other part, a distribution is made on other terms or in another manner than those fixed [fol. 192] by the will or decree of distribution, such substituted distribution must be submitted to and approved by the Court in which the estate is pending, and such Court has power to accept or reject or modify the terms or method of settlement agreed upon as justice may require. He further alleged that the estate of Amelia Pelkes was in process of administration at all times to May 31, 1935, when on the

later date the administration was closed and the jurisdiction terminated by the making of findings, order and Judgment.

Defendant attached, as an exhibit, a copy of what is designated as Findings and Order approving partition correcting receipts for distributive shares, and discharging Executor, which is hereinafter set forth in full as a part of exhibit "E" in defendants' Masons Exhibit No. 22, in the instant action (being the transcript in the Supreme Court of the United States on petition of John Pelkes and Evelyn H. Treinies for writ of certiorari to the Supreme Court of Idaho) and as also contained in exhibit 11, 12, and 13 later referred to in this statement, entered by the Superior Court of the State of Washington for Spokane County in the Estate of Amelia Pelkes, deceased, contained in exhibits 11, 12, and 13 in this instant proceeding and later referred to in this statement. Defendant pleaded as follows:

That the findings, Order and Decree, entered in the matter of the estate of Amelia Pelkes, deceased, by the Superior Court of the State of Washington, for the County of Spokane on the 31st day of May, 1935, as aforesaid was and is a final, binding and conclusive determination and adjudication with respect to the division and distribution of the property of said estate between this defendant and the said Katherine Mason, and is a final, binding and conclusive determination of all the issues there, and here involved, with respect to the administration of said estate, and the [fol. 193] division and distribution of the property of said estate between this defendant and the said Katherine Mason, and that said public acts, records and judicial proceedings of the State of Washington, are entitled to and must be given, full faith and credit by the Courts of the State of Idaho, by virtue of the provisions of Section 1, Article IV of the Constitution of the United States.

Defendant prayed that separate hearing be had upon his plea in abatement and it be decreed that the action was barred by the adjudication of the Superior Court of the State of Washington and that the plaintiffs take nothing by their complaint.

ANSWER OF EVELYN H. TREINIES

Evelyn H. Treinies entered a general appearance and filed an answer to the complaint, which was substantially

similar to the original separate answer of the defendant John Pelkes. No other answer of Evelyn H. Treinies appears in the files of the Shoshone County, Idaho, case. In her answer Evelyn H. Treinies alleged that she was the owner of the said 16,000 shares of Sunshine stock.

ANSWER OF PLAINTIFFS KATHERINE MASON AND T. R. MASON

There appears in the file an answer of the plaintiffs to the plea in abatement by John Pelkes, the material allegations of which are as follows:

The said plaintiffs for answer to the plea in abatement, which Plea in Abatement is labeled "Fifth Affirmative Defense", denies each and every allegation, matter and thing alleged therein save and except as particularly admitted.

The plaintiffs then alleged affirmatively that Amelia Pelkes departed this life on April 24, 1922, leaving as sole heirs, devisees and legatees the defendant John Pelkes and Plaintiff, Katherine Mason, and that her will was admitted to probate, and John Pelkes was named as the executor and [fol. 194] qualified as such. That thereafter and on August 9, 1923, a Decree of Distribution was entered in the Estate of Amelia Pelkes, Deceased as more fully and at large appears from a copy of the petition of Katherine Mason Marked Exhibit "A" and by reference made a part of the Answer.

There was annexed to the Answer a copy of "Petition for Revocation of Letters Testamentary" filed in the Superior Court of the State of Washington for the County of Spokane on December 19, 1934 (which exhibit is a copy of the Petition contained in Exhibit No. 11 in the instant case and hereafter referred to in this statement).

The answer then alleges that on the same date the exhibit was filed in the Superior Court of the State of Washington, for the County of Spokane, a petition was filed by one C. Harold Easter, which petition was referred to in the answer and annexed thereto as exhibit "B" (Exhibit "B" annexed to this Answer is identical with the Petition for Letters of Administration with the will Annexed included in Exhibit 11, in the instant action and hereafter referred to in this statement).

The answer then continues alleging that a citation was issued out of the Superior Court of the State of Washington in and for the County of Spokane, requiring the defendant John Pelkes to appear and show cause why the prayer of the petitions of the plaintiff Katherine Mason and of C. Harold Easter should not be granted, and that thereafter John Pelkes appeared and answered said citation, and the petitions of the said Plaintiff Katherine Mason and the said C. Harold Easter which said answer to the citation is then referred to in the answer and marked Exhibit "C". (Said exhibit "C" is a copy of "Return to Citation filed by John Pelkes in the Superior Court of the State of Washington for Spokane County, in the Matter of the Estate of Amelia [fol. 195] Pelkes, deceased, in which he asked for affirmative relief, which said "Return to Citation" is included in Exhibit No. 11 in the instant action and later referred to in this statement.

The Answer then continues by alleging that under the laws of the State of Washington as they now exist and as they have existed for a long time, the Superior Court of the State of Washington in and for the County of Spokane, is without jurisdiction to try out any controversy arising between the said heirs with reference to any settlement had between them with reference to the assets of the said estate and that any judgment so made on the issues which have been tendered by the above named defendant John Pelkes, all of which more fully appears by answer to citation, would not constitute a bar to the prosecution of an action based on any of the matters and/or things therein alleged, save and except insofar as the same relate to the due administration of the said estate in another forum, and that any judgment so made by the Superior Court of the State of Washington in and for the County of Spokane, would not be res judicata as to the relief prayed for by the plaintiffs.

The answer further alleges that it appears from the face of said Answer to Citation marked Exhibit "C", as well as from the verified answer of the defendant John Pelkes and the verified answer of the defendant Evelyn H. Treinies, that the defendant John Pelkes heretofore divested himself of all right, title and interest in and to the shares of Sunshine Mining Company stock involved in the action, and that John Pelkes is only a nominal although proper and necessary party defendant therein and that no adjudication

of the rights of the parties in interest can be had in said estate proceeding now pending in the State of Washington.

[fol. 196] MOTION FOR ORDER TO SHOW CAUSE AND SHOW CAUSE ORDER

There also appears in said file a motion of T. R. Mason, filed in said cause May 22, 1935, and followed by the affidavit of T. R. Mason, and also contains a restraining order to enjoin and restrain the defendant John Pelkes and Evelyn H. Treinies, or their attorneys, or the plaintiff Katherine Mason or her agents and attorneys from taking any further proceeding in said cause now pending in the Superior Court of the State of Washington in and for the County of Spokane, entitled "In the Matter of the Estate of Amelia Pelkes, Deceased."

There also appears in the said file, Exhibit "1" herein, an Order to Show Cause and Restraining Order signed By Gillies D. Hodge, District Judge of the First Judicial District of the State of Idaho on May 21, 1935, wherein it was ordered that the defendants John Pelkes and Evelyn H. Treinies, together with their agents and attorneys, Wm. B. Hornblower, H. J. Hull, Graves, Kizer & Graves, and Will Graves and Paul Graves, and the plaintiff Katherine Mason, together with her agents and-or Attorneys, to-wit, Lester S. Harrison, Walter H. Hanson, and F. C. Keane, and Glen E. Cunningham and Richard S. Munter, be and appear before the Court in its chambers in Wallace, Shoshone County, Idaho, on the 5th day of June, 1935, at 10:00 o'clock P. M., to then and there show cause why they and each of them should not be restrained and enjoined, during the pendency of the action, and until the final determination thereof, or the further order of the Court, from attempting to further prosecute or do anything in connection with the matter now pending in the Superior Court of the State of Washington in and for the County of Spokane, [fol. 197] entitled "In the Matter of the Estate of Amelia Pelkes, Deceased."

It was further ordered that the said parties and each of them should desist and refrain from taking any further proceedings in such cause pending in said Superior Court of the State of Washington for the County of Spokane Until the further order of the Court, the order to become effective

upon the defendant T. R. Mason furnishing bond in the sum of \$500.00, said bond having been furnished and approved by the Court.

ANSWER OF KATHERINE MASON TO AFFIRMATIVE MATTER IN THE AMENDED AND SUPPLEMENTAL SEPARATE ANSWER OF DEFENDANT JOHN PELKES

Said Exhibit "1" contained also an Answer to the affirmative matter in the amended and supplemental separate answer of defendant, from which it appeared that the plaintiffs in said action, Katherine Mason and T. R. Mason in answer to the affirmative allegations, specifically denied the first, second, third and fourth affirmative defenses, which, save for this reply, would be deemed to be denied by law.

The said plaintiffs then further answered the amended fifth affirmative defense of defendant, the material parts of said affirmative answer are as follows:

In paragraph II they allege that said decree of distribution entered in the estate of Amelia Pelkes on the 9th day of August, 1923, further provided as follows:

"It is hereby ordered, adjudged and decreed that the residue of said estate of Amelia Pelkes, deceased, herein-after particularly described, and now remaining in the hands of said executor and any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit:

John Pelkes, husband, Spokane, Washington, an undivided one-half interest thereof; Katherine Mason, daughter, [fol. 198] ter, Kellogg, Idaho, an undivided one-half interest thereof."

Paragraph III. In answer to Paragraph V of the Fifth Affirmative Defense, they admitted that during the pendency of the probate proceeding, the defendant John Pelkes was approximately 70 years of age, and that Katherine Mason was approximately forty-three years of age, admitted that Katherine Mason had lived in the home of John Pelkes and her mother Amelia Pelkes and was considered and treated as their daughter for a great number of years, that the relation between the said John Pelkes and Katherine Mason

at said time was affectionate and that John Pelkes regarded her as his daughter, but denied each and every other allegation, matter and thing in said paragraph V.

Paragraph IV. Answering Paragraph VI, they admitted that the value of the community estate of Amelia Pelkes, not including the mining stock was approximately \$32,000.00, and that the value of the property, exclusive of mining stock to which Katherine Mason was entitled under the will of Amelia Pelkes, was of the value of approximately \$8,000.00, and denies the balance of paragraph VI.

Paragraph V. Answering paragraph VII of the Fifth Affirmative defense, they admitted that after the entry of the Decree of Distribution, the shares of stock of the Sunshine Mining Company began to have a market value and that in 1927, said corporation paid dividends; admitted that the plaintiffs were and are citizens and residents of the Town of Kellogg in the State of Idaho, very near to which the mines of the Sunshine Mining Company are located, and admitted that several months after this action was instituted, Katherine Mason filed the petition marked Exhibit "B" attached to the amended Answer and that C. Harold Easter filed a petition marked Exhibit "C" attached to the [fol. 199] amended answer, and denied the balance of paragraph VII.

Paragraph VI. Answering paragraph VIII, the plaintiffs admitted that a citation was issued out of the Superior Court of the State of Washington for Spokane County, and served upon the defendant John Pelkes, requiring him to answer and show cause why the relief prayed for by the petitioner should not be granted. Admitted that the defendant appeared in response to said citation; admitted that Katherine Mason moved to dismiss her said petition, and admitted that the Superior Court of the State of Washington for Spokane County granted said motion and indicated that the Court would require her to pay certain costs, but denied the other allegations of paragraph VIII.

Paragraph VII. For answer to paragraph IX, the plaintiffs admitted that after the Superior Court of the State of Washington for Spokane County, so passed upon the motion of Katherine Mason to dismiss, the answering defendant (John Pelkes) purported to file in said court a petition marked exhibit "D" and attached to his said amended

answer; admitted that the Court thereafter on the 31st day of May, 1935, entered the purported findings and order approving partition, correcting receipts for distributive shares and discharging executor, marked Exhibit "E" and attached to his said amended answer. (Exhibits "D" and "E" are attached to the amended Answer of the defendants in said Action in the District Court of Idaho.

Paragraph VIII. For answer to paragraph X, the defendants admitted the existence of the constitutional provisions and statutes of the State of Washington therein pleaded, and admitted that Amelia Pelkes was a resident of Spokane County, Washington, and that she died therein [fol. 200] but denied the other allegations of Paragraph X.

For a further Reply to the Amended Fifth Affirmative Defense, the plaintiffs alleged affirmatively, in substance, as follows: (Appearing from said pleadings included in said Exhibit "1").

1. That on or about the 2nd day of May 1935, the defendant, John Pelkes, filed in the Superior Court of the State of Washington in and for Spokane County, the petition marked as Exhibit "B" and attached to his amended answer; that the said Katherine Mason, appeared specifically by motion to quash the service thereof upon attorneys representing her in the action; that said motion to quash was denied by the Superior Court of the State of Washington. That Katherine Mason, still preserving her special appearance, moved to dissolve the temporary restraining order issued upon the petition of John Pelkes, which motion to dissolve was denied by the Superior Court of Spokane County; that Katherine Mason still preserving her special appearance, resisted a motion to require her to appear before said Superior Court of Spokane County to be examined by John Pelkes, and said resistance was also overruled by the Superior Court of Spokane County, and said Court made an order requiring the said Katherine Mason to appear before said Court for such examination. That thereafter before any further proceedings were had, this Court (Court of Shoshone County, Idaho) on the 21st day of May 1935, issued a restraining order restraining Katherine Mason and her attorneys therein from taking any further action or proceedings in the matter pending in the Superior Court of Spokane County. That upon the service

of said restraining Order said Katherine Mason, still maintaining her special appearance therein presented and filed with said Superior Court of Spokane County a showing in response to order to plead, setting out the existence of [fol. 201] said restraining order issued out of this court and the service of the same upon the parties and attorneys appearing before said Superior Court of Spokane county, a copy of which showing of Katherine Mason in response to said order to plead is attached to said reply, marked Exhibit "A", (entitled: "showing in Response to Order to Plead by Special Appearance", included in Exhibit 12 of the instant action and later referred to in this statement), and is printed as a part of defendant Masons' exhibit No. 22 in the instant case, the same being a record on petition for writ of certiorari to the Supreme Court of the United States.

The Plaintiffs further allege that notwithstanding Restraining Order issued out of the District Court of Idaho, the attorneys for John Pelkes nevertheless in violation thereof, continued to appear in said matter in the Superior Court of Spokane County, and said John Pelkes and his attorneys, in violation of said restraining order, caused the Superior Court of Spokane County to enter on the 31st day of May, 1935, purported findings and order approving partition, correcting receipts for distributive shares and discharging executor.

Paragraph II. In the said Reply to the Amended Fifth Affirmative Defense, the plaintiffs further alleged that on the 9th day of August 1923, in the matter of the estate of Amelia Pelkes, Deceased, the Superior Court of the State of Washington in and for the County of Spokane entered therein its Decree of Distribution of Estate, a copy of which is attached to the reply marked Exhibit "B" and referred to. (Said Exhibit "B" is a copy of the Decree of Distribution issued in the estate of Amelia Pelkes, Deceased, contained in Exhibit "5" in the instant action, and later referred to in this action, and enclosed in Exhibit "11" in the instant action and later referred to in this statement.)

[fol. 202] It was further alleged that said decree was and is the final binding and conclusive determination and adjudication with respect to the division and distribution of the property of said estate; that no appeal was ever taken therefrom and that no action was ever commenced or motion

made to reopen, vacate or modify the decree, and that under the laws of the State of Washington, an appeal therefrom must be taken within ninety days. That under the laws of the State of Washington said decree of distribution of estate could have only been reopened, vacated or modified by an action commenced or a motion entered within one year from the date of entry of said decree of distribution of estate. That the following are the statutes of the State of Washington in full force and effect at all the times herein mentioned applicable to the reopening, vacation and modification of such decree of distribution of estate and fixing the time within which the same must be done. Same could be reopened, vacated or modified only by action commenced or a motion entered within one year. That plaintiff then specifically pleaded the following statutes of the State of Washington, to-wit; 2 Rem. Rev. Stat. Section 464.

Causes for Vacation or Modification of Judgments

“The superior Court in which a Judgment has been rendered, or by which or the Judge of which a final Order has been made, shall have power, after the term (time) at which such judgment or order was made, to vacate or modify such judgment or order:

1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials.
2. By a new trial granted in proceedings against defendant, served by publication only as prescribed in Section 235;
3. For mistakes, neglect, or omission of the Clerk, or irregularity in obtaining the judgment or order;
4. For fraud practiced by the successful party in obtaining the judgment or order;
5. For erroneous proceedings against a minor (or) per-
[fol. 203] son of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceeding;
6. For the death of one of the parties before the judgment in the action;
7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

8. For error in a judgment shown by a minor, within twelve months after arriving at full age."

2 Rem. Rev. Stat. Section 466:

"Petition to Vacate, Etc., to be by Motion When.

The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year."

2 Rem. Rev. Stat. Section 467:

"Petition to be Verified, When. The proceedings to obtain the benefit of subdivision 2, 3, 4, 5, 6 and 7 of Section 464 shall be by petition verified by affidavit, setting forth the judgment or order, the fact or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability."

Paragraph III. In paragraph III of the reply, the said plaintiffs further alleged that the will of said Amelia Pelkes, deceased, was a non-intervention will under the laws of the State of Washington; that the Superior Court of Spokane County, Washington, prior to the entry of the decree of Distribution, entered an Order of Solvency, a copy of which order is Marked Exhibit "G" and attached to the Reply and referred to as a part thereof. (Said exhibit "C" is a copy of the Order of Solvency entered by the Superior Court of Spokane County, Washington, in the matter of the Estate [fol. 204] of Amelia Pelkes, deceased, and contained in Exhibit "11" in the instant action and later referred to in this statement.

Plaintiffs continued in the reply to allege that the effect of said order of solvency was to remove said estate or trust from the further jurisdiction of the Probate Court except to the extent that said John Pelkes, as executor or trustee, could invoke the jurisdiction of the Court, and that the sole jurisdiction of the Court when so invoked would be confined strictly to the matter to which the said executor or trustee

could properly invoke its jurisdiction. The plaintiffs then specifically pleaded Section 1462 of 3 Rem. Rev. Stat. Same being as follows:

3 Rem. Rev. Stat. Section 1462:

Settlement without Court Intervention—Order of Distribution—Mismanagement—Citation.

"In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that such estate shall be settled without the intervention of any court or courts, and where it duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the Court on the filing of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit the will to probate and to file a true inventory of all the property of such estate and give notice to creditors and to the State Board or persons having charge of the collection of inheritance tax, in the manner required by existing laws. After the Probate of any such will and the filing of such inventory all such estates may be managed and settled without the intervention of the Court, if the last will and testament shall so provide. But when the estate is ready to be closed the Court, upon application, shall have authority and it shall be its duty, to make and cause to be entered a decree finding and adjudging that all debts have been paid, finding and adjudging also the heirs [fol. 205] and those entitled to take under the will and distributing the property to the persons entitled to the same, such decree to be made after notice given as provided for like decrees in the estates of persons dying intestate; Provided, however, in all cases, if the party named in such will as executor shall decline to execute the trust or shall die or be otherwise disabled for any cause from acting as such executor, then letters testamentary or of administration shall issue and the estate be settled as in other cases; And provided further, if the person named in the will shall fail to execute the trust faithfully and to take care and promote the interest of all parties, then, upon petition of a creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heir, it shall be the duty of the Court to cite such person having the management

of such estate to appear before such Court, and, if upon hearing of such petition it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them have been or are about to be damaged by such actual doings of the executor, then, in the discretion of the Court, administration may be had and required as is now required in the administration of estates, and in all such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will."

Paragraph IV. Plaintiffs further alleged that under the laws of the State of Washington, the title of said John Pelkes and Katherine Mason to the property willed them by said Amelia Pelkes, deceased, accrued under the said will and that the decree of distribution merely declared the title given or transferred to them by said will; that under the laws of the State of Washington, upon distribution of property by decree or otherwise, the title vests in the distributees and the Courts cannot further, acting in a probate proceeding, affect such title so vested; that under the laws of the State of Washington, the said purported findings and order approving partition, correcting receipts for distributive shares and discharging the executor, at-[fol. 206] tached to the amended answer of the defendants, marked Exhibit "E" is utterly void and of no force and effect; that under the laws of the State of Washington, no formal probate proceedings are necessary to vest the title to the property of a decedent in his heirs or persons entitled to the same, provided all debts and obligations of decedent and taxes are paid. The plaintiffs then specifically pleaded Section 1533 of 3 Rem. Rev. Stat. of Washington, which are as follows:

3 Rem. Rev. Stat. Section 1533:

Hearing on Final Report—Decree of Distribution

"Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which such hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. Any person interested may file objections to the said report and petition

for distribution, or may appear at the time and place fixed for the hearing thereof and present his objections thereto. The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled, and whether the transactions of the executor or administrator should be approved, and to determine who are the legatees or heirs or persons entitled to have the property distributed to them, and the Court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the [fol. 207] estate, and that all debts *been* paid, and by such decree shall distribute the real and personal property to those entitled to the same. The Court may, upon such final hearing, partition among the persons entitled thereto, the estate held in common and undivided, and designate and distribute their respective shares; or assign the whole or any part of said estate to one or more of the persons entitled to share therein. That the person or persons to whom said estate is assigned shall pay or secure to the other parties interested in said estate their just proportion of the value thereof as determined by the Court from the appraisement, or from any other evidence which the Court may require.

If it shall appear to the Court at or prior to any final hearing that the estate cannot be fairly divided, then the whole or any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property by executors or administrators and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree. Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.

The Court shall have authority to make partition distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such [fol. 208] estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable, except upon a hearing before the Court and upon the testimony of at least three disinterested witnesses previously appointed by the Court for the purpose of viewing such property to be partitioned or sold. The Court shall fix the values

of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the proceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable.

The provisions of this section shall be concurrent with and not in derogation of other existing statutes as to partition of property".

There was also included in said Exhibit No. 1, and considered by the Court, the findings of fact, conclusions of law and decree of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, entered on September 30, 1935, signed by Hon. Miles S. Johnson, District Judge, which said findings and conclusions and decree are as follows, to-wit:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Court sitting in equity on June 22, 1935, defendant Treinies appearing by her counsel of record herein, the other individual parties appearing personally and by their respective counsel of record herein, and defendant Sunshine Mining Company [fol. 209] having appeared generally upon a motion to set aside default, and witnesses having been sworn, and oral and documentary evidence introduced, and the cause having been taken under advisement, and the Court, being fully advised in the premises, now makes, renders and enters its findings of fact and conclusions of law as follows, to-wit:

FINDINGS OF FACT

1. That the complaint herein was filed upon the 4th day of August 1934, that all of the defendants were duly and regularly served with a copy of the complaint and summons and a temporary restraining order therewith enjoining the transfer of the stock of the Sunshine Mining Company hereinafter mentioned; that defendants Thinnes, Treinies and Pelkes filed their answers in the case on or before the 1st day of March, 1935; that the default of the defendant Sunshine Mining Company was duly and regularly entered on the 29th day of August 1934, and that said defendant thereafter appeared generally upon a motion to set aside the

said default, which motion was denied, and that all of the parties have appeared generally; that the temporary restraining order issued the 4th day of August, 1935, enjoining the transfer of Certificate No. 1755-A for sixteen thousand (16,000) shares of the capital stock of defendant Sunshine Mining Company standing in the name of defendant Treinies together with other stock, was thereafter made permanent pendente lite and is in effect at the time of the making of these findings as to the said certificate standing in the name of defendant Treinies; that upon the trial of the case [fol. 210] plaintiffs and all of the defendants save the defendant Treinies appeared in person; that prior to the reception of evidence the action was dismissed as to defendants Thinnies by stipulation and order of this Court without affecting the rights of any of the other parties.

II. That plaintiffs are and at all the times herein mentioned were husband and wife, and that defendant Sunshine Mining Company is a corporation organized and existing under the laws of the State of Washington, with its principal office in Yakima in said state, but lawfully doing business in the State of Idaho in compliance with the Constitution and laws of the latter State relating to foreign corporations.

III. That defendant Sunshine Mining Company is engaged only in the business of mining; that all of its mining properties are situate in Shoshone County, Idaho, and that all its business is carried on in said County, saving only matters relating to its corporate records and the registration and transfer of its stock, and that for the latter purpose the corporation is a Washington corporation. The Vice-President in charge of production and the assistant Treasurer, who is also the statutory agent of the corporation, reside in the State of Idaho, and that the whole tangible and ponderable substance of the corporation is in this State.

IV. That about the year 1890 the defendant Pelkes in Shoshone County, Idaho, married Amelia Goetz, a widow with two daughters, one of whom died without issue, and [fol. 211] the other of whom is the Plaintiff Katherine Mason, who was at the time of the marriage about eight (8) years old; that the family resided in Shoshone County, Idaho, for some sixteen (16) or eighteen (18) years after the marriage, and Katherine Mason was raised in the Pelkes

home and there resided until her own marriage, and that her relationship with John Pelkes was one of such confidence and affection as ordinarily exists between parent and child, and so continued until the year 1934.

V. That defendant Pelkes and his said wife acquired certain mining interests in prospects in Shoshone County, Idaho, and that in 1920 by transfers of these interests Pelkes acquired certificate No. 111 for Thirty Thousand Five hundred Ninety-eight (30,598) shares of capital stock of the defendant Sunshine Mining Company which was the community property of himself and his said wife.

VI. That on or about the 19th day of April 1922, Amelia Pelkes died testate and that her said will was duly and regularly filed for probate in the Superior Court of the State of Washington for Spokane County sitting in probate; that the said will was a non-intervention will; that the same was admitted to probate as a non-intervention will; that an inventory in due and regular form was duly and regularly filed in the cause, and that by the terms of the said order and by law defendant Pelkes, named as the sole executor without bond, was required and authorized to settle and distribute the estate without the intervention of the Court, as is provided by the law of Washington in the case of non-[fol. 212] intervention wills after the entry of an order of solvency.

VII. That such proceedings were thereafter had, including the entry of an order of solvency, that the estate was completely probated, and that on August 9, 1923, a final decree of distribution was duly and regularly entered distributing all of the property of the estate, including the property not known or described, to John Pelkes and Katherine Mason as sole heirs in the proportions provided by the will.

VIII. That immediately after the death of his wife John Pelkes returned to Kellogg, Idaho, and took up his residence in the home of the plaintiffs, where he continued to reside until 1926; that after the entry of the decree of distribution John Pelkes, at Kellogg, Idaho, as executor of his wife's estate, delivered into the possession and control of himself and Katherine Mason, as the sole heirs and distributees of the estate, manual possession of all chattels thereof and belonging thereto, and constructive possession of all the real

property, in exact and literal performance of the terms of the said decree of distribution. That said decree of distribution has never been reversed, modified or annulled, and that in accordance with the law of the State of Washington the time within which to reverse, modify or annul the same had long since expired prior to the institution of this action.

IX. That thereupon the said John Pelkes and Katherine Mason, at Kellogg, Idaho, divided between themselves in equal parts [vol. 213] severally all of the property of the estate consisting of the entire community property of John and Amelia Pelkes, and including the mining stocks of the said estate, which were delivered into the joint possession of the said distributees at Kellogg, Idaho.

X. That as to the mining stocks the distributees then and there agreed that the legal title thereof, which stood in the name of John Pelkes, should remain in his name, but that Katherine Mason's undivided interest therein should be held by him as trustee for her; that the stocks had then only prospective value and that it was agreed between the said distributees that if and when the stocks or any of them should acquire any value the said Pelkes would upon the command of Mrs. Mason transfer to her her undivided interest therein and account to her for the dividends thereon, and that all of the securities divided between the said distributees in severalty and the said mining stocks were deposited in a safety deposit box in a bank at Kellogg, Idaho, opened in the joint names of the two parties and to which both had keys and from time to time had access;

That evidence admitted without objection established that John Pelkes and Katherine Mason entered into an arrangement for the equal division of the entire property of the marital community composed of John Pelkes and Amelia Pelkes, and that after the entry of the decree of distribution they so divided the property, including the mining stocks, but that the parties were acting under a mistake of fact in assuming [vol. 214] that the intention of Amelia Pelkes could be established in any other way than by the terms of the plain and unambiguous will, and the evidence of the said arrangement and division is incompetent; and the excess of approximately \$7500 in property other than mining stocks received by Katherine Mason above the undivided one-fourth interest given her by the will of Amelia Pelkes should in equity be set against the dividends upon Katherine Mason's quar-

ter-interest in the Sunshine Mining stock hereinafter referred to.

The Court finds that there was no competent evidence to support any contention that there was any division of the community property between John Pelkes and Katherine Mason other than that provided by the will of Amelia Pelkes, deceased, and the decree of distribution; and the Court therefore finds from the terms of the said will and decree of distribution that Katherine Mason was entitled to receive and did receive an undivided one-quarter of said community property of the said John Pelkes and Amelia Pelkes, and upon the receipt of her said one-fourth interest in the said mining stocks, including the shares of stock in the Sunshine Mining Company, did place the same in trust as aforesaid with the said John Pelkes.

XI. That the stock of the Sunshine Mining Company began to acquire value about the year 1927 and that small dividends began to be paid thereon; that defendant Pelkes requested that he be allowed to keep these dividends for his own use and that Katherine Mason granted him permission so to do upon the understanding that he would keep an [fol. 215] account of the dividends and would account to her for them.

XII. That from time to time thereafter Katherine Mason mentioned to John Pelkes her interest in the stock of the Sunshine Mining Company and the other mining stocks held in trust by him as aforesaid; that the trust under which the stocks were held by John Pelkes was at no time denied or repudiated by him but on the contrary was admitted, and that when the same was mentioned the said Pelkes expressed his purpose and intention of performing the trust and lulled plaintiff Katherine Mason into repose by reason of her confidence and trust in him.

XIII. That before the 27th day of October, 1931, defendant Pelkes transferred twelve thousand (12,000) shares of the said stock of the Sunshine Mining Company to defendant Pierre Thinnes; that Katherine Mason learned that some transfer had been made by Pelkes to Thinnes without learning the amount, and she made inquiry of Pelkes as to the transaction and was informed by him that he had transferred only a small portion of the stock and that he retained all of the stock which he held in trust for her and a large portion

his own stock, and that Katherine Mason believed and relied upon such representations.

XIV. That until the year 1926 defendant Pelkes lived in the home of the plaintiffs at Kellogg, Idaho, as a member of the family and without paying any compensation therefor, and that during that time he was treated as a member of the family, and the relationship between himself and the plaintiff [p. 216] Katherine Mason was such as ordinarily exists between father and daughter; that in the latter part of 1926 Pelkes took up his residence in the home which he had built for his nephew, Pierre Thinnes in Kellogg, Idaho; that after the transfer to Pierre Thinnes of the stock of the Sunshine Mining Company hereinabove mentioned, defendants Thinnes moved to California and that thereafter defendant Pelkes removed to California, returning, however, annually to Kellogg until the year 1934.

XV. That in the year 1931 defendant Pelkes, returning from California with plaintiff Katherine Mason, met defendant Treinies at a hotel in Tacoma; that said defendant Treinies is a cousin of Katherine Mason and that defendant Pelkes met the said defendant only once before, when she was a girl twelve or thirteen years of age; that at the time of the meeting in Tacoma defendant Treinies was a woman of approximately forty-two (42) years of age and defendant Pelkes was a man nearly eighty (80); and at that and other times the said defendant Treinies was advised by plaintiff Katherine Mason that Pelkes was not a rich man and that his income was derived mostly from stock of the Sunshine Mining Company which defendant Pelkes held in trust for said plaintiff.

XVI. That thereafter defendant Pelkes resided at various places in Oregon and California where he was accompanied by defendant Treinies, and that on or before the 13th day of November, 1933, the defendant Pelkes transferred to the defendant Treinies a business block which he owned in Kellogg, Idaho, and which he had acquired shortly theretofore for [p. 217] a consideration of Nine Thousand Dollars (\$9,000), and likewise transferred to defendant Treinies a certificate for Sixteen Thousand (16,000) shares of the capital stock of Sunshine Mining Company, of which seven thousand six hundred forty-nine and one-half (7,649½) shares were represented and was the portion belonging to Katherine

Mason inherited from her mother's estate and held by defendant Pelkes in trust, and of which defendant Treinies had full knowledge and notice; that defendant Pelkes retained title to none of his property or estate except two (2) unimproved lots of doubtful value in the City of Spokane, Washington; that the said transfer of the said Sunshine Mining Stock was without consideration, was made in fraud of the plaintiff Katherine Mason's rights and was fraudulent, and that defendant Treinies took the said stock with full notice and knowledge that as to seven thousand six hundred forty-nine and one-half (7,649½) shares thereof defendant Pelkes had no title and that the purported transfer was a fraudulent transfer as against the plaintiffs.

XVII. That after the issues had been joined in this case before this Court and on or about the 19th day of December, 1934, plaintiff Katherine Mason acting under a mistake of law and fact, filed her petition in the Superior Court of Spokane County, Washington, sitting in probate in the matter of the estate of Amelia Pelkes, deceased, alleging the existence of unadministered assets of the said estate including the stock of the Sunshine Mining Company herein referred [fol. 218] to, and other assets and alleging that Pelkes, as executor, had wasted or mismanaged the estate and that he had not been finally discharged as executor, and praying for the administration of the supposed unadministered assets and the appointment of an administrator therefor de bonis non and for an accounting and for the removal of the said Pelkes as executor; that to said petition Pelkes answered, denying the existence of any unadministered assets and that he had wasted or embezzled any part of the estate, and filed a cross petition alleging that as executor he has fully and completely distributed the estate to the distributees named in the distribution and in accordance therewith, and that no assets of the estate remained in his hands, and alleged further that he had not procured his discharge as executor because he was not advised that under the law of Washington it was necessary for him to secure and file a receipt from Katherine Mason, and further alleging that after the distribution of all of the said property pursuant to the said decree of distribution he had purchased from the defendant Katherine Mason for a valuable consideration all of her interest in the mining stocks owned by the said estate and particularly the Sunshine Mining Stock which is

the subject matter of this controversy; that prior to the filing of the said cross-petition the said Pelkes had filed an answer in the District Court of the First Judicial District of the State of Idaho for Shoshone County alleging and submitting for adjudication the self-same controversy which by this cross-petition he sought to submit for adjudication to the [fol. 219] Superior Court of Spokane County, Washington, sitting in probate.

XVIII. That after the filing of the said Answer and cross petition of defendant Pelkes in the said Superior Court, plaintiff Katherine Mason sought to dismiss her petition and to withdraw from the court, and that defendant Pelkes successfully resisted her withdrawal and sought to press in the Superior Court for an adjudication of his purported title to the said Mining Stock set out in his cross-petition.

XIX. That thereupon the plaintiff T. R. Mason applied to the District Court of the First Judicial District of the State of Idaho, in and for Shoshone County for a restraining order restraining defendant Pelkes, his agents and counselors, from prosecuting or attempting to prosecute in the said Superior Court the controversy with reference to the title to the stock of the Sunshine Mining Company which had heretofore been submitted to the said District Court, and that thereupon the said District Court issued its restraining order restraining defendant Pelkes and his counsel from further proceeding in the Superior Court to attempt to adjudicate the title to the stock of the Sunshine Mining Company which controversy had heretofore been submitted to the said District Court and of which the said District Court had exclusive jurisdiction, and which action was then pending therein; that the said restraining Order was duly and regularly served upon counsel for defendant Pelkes prior to May 31, 1935, and copies thereof were duly and regularly [fol. 220] delivered to counsel for the other defendants, and that the said defendants, and all of them, and their counsel, and all of them, had notice of the said restraining order.

XX. That notwithstanding the service and notice of the restraining order of the said District Court, and contrary thereto, and in violation thereof, the said Pelkes and his counsel proceeded in the Superior Court of Spokane, Washington, in their attempt to procure from said Court a purported adjudication of the title of defendant Pelkes and his

assigns, to the said stock of the Sunshine Mining Company; and that on the 31st day of May 1935, and in the absence of the plaintiff Katherine Mason, defendant Pelkes and his counsel procured from the said Superior Court an order entitled "Finding and Order Approving Partition, Correcting Receipts for Distributive Shares, and Discharging Executor", wherein the said Superior Court, among other things found that by partition between defendant Pelkes and plaintiff Katherine Mason after entry of the decree of distribution in the estate of Amelia Pelkes, defendant Pelkes acquired all of the mining stocks of the said estate including the stock of the Sunshine Mining Company in controversy in this action and whereby the Court ordered that the said partition "is in all respects approved and is adopted as a settlement, partition and distribution originally made under the approval and order of this Court, and effect should be given to it as though it were embodied in the decree of distribution of this Court;" and said Superior [fol. 221] Court of Washington specifically found and held that "full distribution of the property of the estate has been made to the beneficiaries entitled thereto."

XXI. That the said Superior Court was without jurisdiction to make the said finding and order last referred to, or any part thereof and that the said findings and order were procured in violation of the restraining order of this court issued under date of May 21, 1935, and that the defendant Evelyn H. Treinies and the defendant John Pelkes, acting in his capacity as an individual, and the plaintiff T. R. Mason were not parties to nor did they or any of them appear in or participate in said Washington probate proceedings.

XXII. That plaintiffs until the Fall of 1933 had implicit confidence in defendant Pelkes; that they had not nor did either of them have any knowledge or notice or means of knowledge or notice of said defendant's intention to violate or repudiate the trust hereinabove mentioned, and that said defendant prior to the Fall of 1933 did not violate or repudiate the said trust nor do any act or thing which was brought to the notice of the plaintiffs or either of them, which would put them upon inquiry; that plaintiffs made no demand upon defendant for the said stock until the fall of 1933, and that at the time the plaintiff Katherine Mason demanded said stock from the said defendant John

elkes she was again lulled into repose by the assurance of the said defendant John Pelkes that he would go to Wallace the next day and see his attorney with reference to protecting her right, and upon his return from Wallace the next [fol. 222] day he again assured the plaintiff Katherine Mason that the whole matter had been taken care of and that she was fully protected; that the said Katherine Mason still retained a feeling of confidence and trust in the said defendant John Pelkes and did not know until the month of July, 1934, that the said John Pelkes had violated his trust and had caused said stock to be transferred as aforesaid; that plaintiffs' claims herein are not barred by laches or by the statute of limitations.

XXIII. That Katherine Mason is the owner of and entitled to the possession of Seven Thousand Six Hundred forty-nine and one-half ($7,649\frac{1}{2}$) shares of the said stock of the Sunshine Mining Company standing in the name of the defendant Treinies, and that plaintiffs as a community are the owners of and entitled to receive the dividends accumulated thereon since the 4th day of August, 1934; that between the 9th day of August 1923, and the 4th day of August 1934, defendant Pelkes had received approximately \$9,714.86 in dividends upon the said shares of stock owned by Katherine Mason; that plaintiff Katherine Mason had agreed that he might collect said dividends upon the understanding that he would pay any assessments upon any or all of the mining stocks owned by him and Mrs. Mason under the decree of distribution in the Amelia Pelkes Estate; part of the dividends received by him having been so applied; that the amount of dividends so received by Pelkes is in excess of the value of the property delivered [fol. 223] by him to Katherine Mason over and above the one-half interest in her mother's estate to which she was entitled under the will; that the excess amount so delivered by Pelkes to Katherine Mason in the division of the property after the decree of distribution was not given or received as consideration for the purchase of her interest in any of said mining stocks, and that she did not then nor has she at any subsequent time ever parted with any interest which she might have in said stocks; that in equity the two items in this paragraph mentioned are found to be off sets against each other.

XXIV. That on the 19th day of December 1934, when Katherine Mason filed in the Superior Court of the State of Washington her petition in the matter of the estate of Amelia Pelkes, deceased hereinabove referred to, the estate of Amelia Pelkes had been completely distributed for more than ten (10) years, and after its distribution the entire estate had been divided and delivered in severalty to John Pelkes and Katherine Mason, as the sole heirs of the estate, pursuant to a settlement made between them as the heirs, and fully performed after the decree of distribution in said estate had been entered; that at the time of the filing of the petition there were no unadministered assets of the said estate in possession of John Pelkes, as executor; that there was no subject matter of the said estate over which the Superior Court of Washington sitting in probate had or could acquire jurisdiction; that the said Superior Court had no jurisdiction to approve or disapprove the settlement and division of the estate theretofore made between the heirs; [fol. 224] that it had no jurisdiction over the parties to the controversy before this District Court nor the subject-matter of said controversy, to-wit, that portion of stock of the Sunshine Mining Company, the equitable title to which was owned by plaintiffs, and the legal title of which stood in the name of defendant Treinies a resident of California; and that all of the findings, orders and decrees of the said Superior Court sitting in Probate in said proceedings had subsequent to the filing of the said petition of Katherine Mason, saving the discharge of the executor, are and were without jurisdiction and null and void.

XXV. The Court further finds that John Pelkes did not purchase from Katherine Mason or otherwise acquire Katherine Mason's interest in the Sunshine Mining Stock or any of the mining stocks distributed to John Pelkes and Katherine Mason, as sole heirs of Amelia Pelkes, deceased, by decree of distribution of the Superior Court of the State of Washington, and that he did not become the owner of Katherine Mason's interest in the said stocks, or any of them, but held her interest in trust as hereinbefore found.

XXVI. This is an action upon a trust. The trust arose out of the settling of an estate by the heirs after a decree of distribution years ago, and this Court alone has jurisdiction of the parties and the subject-matter, and its jurisdiction having attached it could not be divested and was

not divested or in anywise impaired by proceedings thereafter had in the Courts of Washington.

XXVII. The Court further finds that under the non-intervention will of Amelia Pelkes and under the law of [fol. 225] Washington and under the decree of distribution entered by the Superior Court sitting in Probate, John Pelkes, as executor, of the estate of Amelia Pelkes, deceased, was fully and completely discharged and exonerated of his trust as executor upon the delivery to the heirs of the deceased of the entire property of the estate as directed by the decree, and that a formal record of his discharge in the said Superior Court sitting in Probate was unnecessary, and, had it been made, would have been immaterial in this case.

XXVIII. That this was and is a proper cause where a temporary restraining order and/or injunction and a restraining order and/or injunction pendente lite should issue, and that there was sufficient basis therefor, and the same was regularly and properly issued.

XXIX. That the plaintiffs and defendants stipulated in open Court that the Honorable Miles S. Johnson, Judge, be authorized and empowered to sign any and/or all orders in connection with the above entitled cause at his domicile in Lewiston Idaho, or any place within the State of Idaho, and that said stipulation and agreement thereupon received the approval of the Court.

XXX. That the stock of the Sunshine Mining Company has a fluctuating value, and between the time of the institution of this suit and the trial thereof the value fluctuated from approximately six dollars to approximately twenty-five dollars a share.

[fol. 226]

Conclusions of Law

As a matter of law from the facts found the Court concludes:

That judgment should be entered adjudging Katherine Mason to be the owner of Seven Thousand Six hundred Forty-nine (7,649) shares of stock of the Sunshine Mining Company evidenced by stock certificate No. 1755-A standing of record on the books of the Company in the name of defendant Treinies and that the community of Katharine Mason and her husband should be adjudged to be the owners of the

undistributed dividends on said stock accrued and accruing since August 4, 1934; that by the said decree defendant Treinies should be ordered and required within ten (10) days after the entry of the decree to endorse and deliver to the defendant Sunshine Mining Company the said certificate of stock No. 1755-A and that defendants Treinies and Pelkes should be permanently enjoined from disposing of the said stock in any other manner than as directed by the said decree; that the decree should direct that upon the surrender of the said certificate of stock to the Sunshine Mining Company, the said Company should issue a certificate of stock for seven thousand six hundred forty-nine (7,649) shares to Katherine Mason, and should issue a certificate for the residue of the stock evidenced by Certificate No. 1755-A to Evelyn Treinies or her assigns; that the Sunshine Mining Company should be permanently enjoined from making any transfer or any disposition of the said stock except in accordance with the decree of the court, and should be [fol. 227] permanently enjoined from paying any dividends upon the said Certificate No. 1755-A to defendant Treinies or her assigns until the said defendant Treinies has complied with the decree of the Court; that if defendant Treinies shall fail to endorse and surrender the said certificate of stock within the time required by the decree then the defendant Sunshine Mining Company should by the decree be ordered and directed to cancel the said certificate of stock of record and to issue a new certificate for 7,649 shares in the name of Katherine Mason, and to pay to plaintiffs the undistributed dividends accrued and accruing thereon since August 4, 1934, and that upon the surrender of Certificate No. 1755-A by defendant Treinies or her assigns defendant Sunshine Mining Company should be directed to issue a certificate of stock for the residue thereof to defendant Treinies or her assigns; and pay the accrued and accruing dividends thereon to said defendant Treinies or her assigns;

That the decree should adjudge that the temporary restraining order issued in this case on August 4, 1934, and the restraining Order and/or injunction pendente lite thereafter made are valid and that the bond or bonds given thereunder should be discharged;

That defendants should by said decree be enjoined from commencing or taking any proceedings in the Courts of Washington in the matter of the estate of Amelia Pelkes, de-

ceased, and/or in any Court with reference to the subject [fol. 228] matter of this action or the relief given to the parties by the decree in this action, and should be permanently enjoined from taking any proceedings except by appeal or application to the Supreme Court of Idaho.

That the decree should adjudge that plaintiff's claims are not barred by laches or by any statute of limitations;

That said decree should further provide that plaintiffs save and recover their costs.

Done in open Court this 28th day of September 1935.

Miles S. Johnson, District Judge Who Tried Said Cause.

[fol. 229]

DECREE

This cause came on for trial before the Court in equity on June 22, 1935, defendant Treinies appearing by her counsel of record herein, and other individual parties appearing personally and by their respective counsel of record herein, and defendant Sunshine Mining Company having appeared generally upon a motion to set aside default, and witnesses having been sworn, and oral and documentary evidence introduced, and the cause having been taken under advisement, and the court having made and entered its findings of fact and Conclusions of Law, now based thereon, makes, renders and enters its judgment and decree as follows:

It is Ordered, Considered, Adjudged and Decreed that plaintiff, Katherine Mason, is the owner of seven thousand six hundred forty-nine (7649) shares of the capital stock of the Sunshine Mining Company evidenced by Certificate No. 755-A of the stock of said company standing of record in the name of the defendant, Evelyn H. Treinies; and the plaintiffs are the owners of dividends accrued and accruing thereon since August 4, 1934.

It is Further Ordered, Considered, Adjudged and Decreed, that defendant Evelyn H. Treinies be and she is hereby ordered, directed and required within ten (10) days from the filing of this decree to endorse and deliver to the Sunshine Mining Company the said certificate of stock No. 755-A and upon receipt of the said certificate the Sunshine Mining Company is ordered, directed and required to cancel the same of record and in lieu thereof to issue and deliver

to Katherine Mason a certificate for seven thousand six hundred [fol. 230] forty-nine (7649) shares of said capital stock and to pay to plaintiffs the dividends accrued and accruing thereon since August 4th, 1934; and to issue and deliver to defendant, Evelyn H. Treinies, or her assigns a certificate of capital stock for the residue of the stock evidenced by the said Certificate No. 1755-A and to pay to defendant Treinies, or her assigns, the dividends thereon accrued or accruing since August 4th, 1933.

It is Further Ordered, Considered, Adjudged and Decreed, that if defendant, Evelyn H. Treinies, shall fail to endorse and surrender the said certificate of stock No. 1755-A within ten (10) days after the filing of this decree, then defendant, Sunshine Mining Company shall cancel the said certificate of stock of record and shall issue and deliver a certificate for Seven Thousand Six Hundred forty-nine (7649) shares of capital stock of the Sunshine Mining Company to Katherine Mason, and pay to plaintiffs the dividends accrued and accruing thereon since August 4, 1934, and defendant Sunshine Mining Company shall issue and deliver a certificate of stock to Evelyn H. Treinies, or her assigns, for the residue of the stock evidenced by said certificate No. 1755-A and shall pay to the said Evelyn H. Treinies, or her assigns, the dividends accrued and accruing thereon since August 4, 1934, upon the endorsement and surrender of the said certificate No. 1755-A.

It is Further Ordered, Considered, Adjudged and Decreed, that defendant Evelyn H. Treinies and John Pelkes and Sunshine Mining Company, their attorneys, agents, employees [fol. 231] and persons acting in their aid or assistance, be and they are hereby permanently enjoined from transferring the said certificate No. 1755-A or disposing of the same or of any of the stock evidenced thereby otherwise than as required by this decree; and the defendant, Sunshine Mining Company, be and it is hereby enjoined from paying to the defendant Evelyn H. Treinies or her assigns, any dividends upon the said stock until the said defendant, Evelyn H. Treinies shall have complied with this decree.

It is Further Ordered, Considered, Adjudged and Decreed, that the plaintiff's claims are not barred by laches or by any statute of limitations.

It is Further Ordered, Considered, Adjudged and Decreed, that the temporary restraining order issued in this

cause on the application of plaintiffs on August 4th, 1934, and the injunction and/or restraining order pendente lite thereafter issued upon plaintiffs' application be and they are adjudged to be valid, and that the bonds given for the procurement of the said orders or injunctions be and they are hereby discharged.

It is Further Considered, Ordered, Adjudged and Decreed, that defendants and each of them be and they are hereby restrained and enjoined from commencing or taking any further proceedings in the Courts of Washington in the matter of the Estate of Amelia Pelkes, deceased, or in any court with reference to the subject-matter of this action, or with reference to the relief given to the parties by this decree; and defendants, and each of them, are permanently [fol. 232] enjoined and restrained from taking any such proceedings, saving only by appeal or application to the Supreme Court of Idaho.

It is Further Considered, Ordered, Adjudged and Decreed, that plaintiffs recover their costs taxed in the sum of \$200.35.

Done this 28, day of September, 1935.

Miles S. Johnson, District Judge Who Tried Said Cause.

[fol. 233] There was also included in said exhibit No. 1 and considered by the Court, the opinion of the Supreme Court of the State of Idaho, dated the 23rd day of July, 1936, which opinion is as follows:

OPINION OF THE SUPREME COURT OF IDAHO

MORGAN, J.:

This suit was commenced August 4, 1934, by Katherine Mason and T. R. Mason, her husband, against John Pelkes, Evelyn H. Treinies, Frances Thinnies and Pierre Thinnies, her husband, and Sunshine Mining Company, to procure a decree adjudging 15,299 shares of capital stock of the mining company to have been held by Pelkes in trust for Katherine Mason prior to his transfer of it to Treinies, Thinnies and his wife; that the transfers were fraudulent and without consideration and in violation of the trust; that the defendants, other than the mining company, be enjoined from

selling or otherwise disposing of the stock, and that the mining company be enjoined from permitting a transfer thereof and from paying any dividends thereon pending final determination of the suit; also for an accounting for dividends theretofore paid. A temporary restraining order and injunction pendente lite were granted.

The case was dismissed as to Thinnes and wife before trial. The mining Company, having been served with summons, failed to appear within the time prescribed by statute for appearance and its default was entered August 29, 1934. It moved to vacate the default, and for an order permitting it to answer and cross-complain. The motion was overruled and a trial of the issues framed by the com-[fol. 234] plaint and the answer of defendants, Pelkes and Treinies, resulted in a decree wherein a certificate for 16,000 shares of stock in Sunshine Mining Company, standing of record in the name of the latter was erroneously referred to and described as Certificate No. 1755-A. The parties litigant stipulated that wherever in the pleadings, proceedings, orders and decree reference has been made to certificate No. 1755-A the number of said certificate shall be corrected, changed and construed to be No. 2777-A. The stipulation is approved and it is directed that the findings of fact, conclusions of law and decree be amended accordingly and the certificate will be hereinafter referred to as No. 2777-A.

By the decree there was awarded to Katherine Mason 7,649 shares of stock evidenced by certificate No. 2777-A, held by Treinies and she and her husband were adjudged to be the owners of the dividends accrued and accruing thereon since August 4, 1934. Treinies was ordered, directed and required, within ten days, to endorse and deliver to the mining company said certificate held by her. The mining company was ordered, directed and required to cancel the certificate of record, and in lieu thereof to issue and deliver to Katherine Mason a certificate for 7,649 shares of said stock and to pay to plaintiffs the dividends accrued and accruing thereon since August 4, 1934; also to deliver to Treinies, or her assigns, a certificate for the residue of the stock evidenced by certificate No. 2777-A and to pay to her, or her assigns, the dividends thereon accrued and ac-[fol. 235] cruing since August 4, 1934. The decree further provided that if Treinies failed to endorse and surrender the certificate within ten days the mining company should

cancel it of record and issue and deliver a certificate for 7649 shares of said stock to Katherine Mason, and pay to plaintiff the dividends accrued and accruing thereon since August 4, 1934; also it should issue and deliver a certificate to Treinies, or her assigns for the residue of the stock evidenced by certificate No. 2777-A and pay to her, or her assigns, the dividends accrued and accruing thereon since August 4, 1934, upon the endorsement and surrender of the certificate held by her. Treinies, Pelkes, Sunshine Mining Company and their attorneys were enjoined from transferring certificate No. 2777-A and from disposing of it, or of any of the stock evidenced by it, otherwise than as required by the decree, and the mining company was enjoined from paying to Treinies, or her assigns, any dividends on the stock until she had complied with the decree. It was further decreed that the claims of plaintiffs were not barred by laches nor by the statutes of limitation; that the temporary restraining order and injunction pendente lite, issued on plaintiffs' application, were valid and that the bonds given for the procurement thereof were discharged; also that the defendants, and each of them and their attorneys, be and they were enjoined from commencing nor taking any further proceedings in the Courts of Washington in the matter of the estate of Amelia Pelkes, deceased, or in any court with reference [fol. 236] to the subject-matter of this action, or with reference to the relief given by the decree, except by appeal or application to this court.

The mining company appealed from the decree and complains of the action of the court denying its motion to set aside the default and refusing to permit it to answer and cross-complain. Defendants, Pelkes and Treinies, appealed from the decree, and from the whole thereof, and plaintiffs cross-appealed from the portions of the decree wherein it was ordered that the mining company issue and deliver to defendant, Treinies, a certificate of stock and pay her, or her assigns, dividends thereon. The effect of the cross-appeal is to call in question the portions of the decree which awarded less than 15,299 shares of stock to Katherine Mason together with the dividends accrued and accruing thereon since August 4, 1934, to her and her husband, and for an accounting and judgment for those theretofore paid. The appeal of the mining company will be considered separately from the others.

The Sheriff's return, filed August 10, 1934, shows he served the summons on Sunshine Mining Company by delivering a copy to it, to which was attached a copy of the complaint in the suit, to J. B. Cox, the assistant treasurer of said corporation, personally, in Shoshone County, Idaho, on August 4, 1934.

The Mining Company is a Washington corporation which had conformed to the laws of Idaho entitling it to transact business here. I. C. A. Sec. 29-502 requires such a corporation [fol. 237] to designate an agent in the county in which is situated its principal place of business in Idaho, upon whom process issued by authority of or under any law of this state may be served. Sec. 5-507 provides: "The summons must be served by delivering a copy thereof as follows: * * * If the suit is against a foreign corporation * * * doing business and having a managing or business agent, cashier or secretary within this state, to such agent, cashier or secretary or to any station, ticket or other agent of said corporation, transacting business thereof, in the county where the action is commenced, and if there is no such agent in said county then service may be made upon any such agent in any other county."

The Mining Company gave notice that it would, on June 24, 1935, move the court to vacate and set aside the default made and entered against it on August 29, 1934, and for permission to file an answer and cross-complaint. The motion was made and was, on June 25, 1935, denied. June 24, 1935, the sheriff filed an amended return in which he certified he personally served the summons in this suit "upon Sunshine Mining Company, a corporation, one of the within named defendants, by delivering to and leaving with one J. B. Cox, known to me to be the designated statutory agent, director and assistant Secretary or assistant Treasurer of said corporation, personally in the County of Shoshone, State of Idaho, on the 4th day of August, A. D. 1934, a copy of said summons, attached to which was a copy of the complaint referred to in said summons."

The mining company contends the clerk was without jurisdiction [fol. 238] to enter the default because the Sheriff's return, on file when it was entered, failed to show service of the summons on it. This contention is based on the theory that the assistant treasurer of a foreign corporation is not such an officer or agent that delivery of a copy of the summons to him constitutes service on it. Assuming this

contention to be correct it is not available to the Mining Company for the amended return, filed prior to the decision on the motion, shows service on its designated agent. Jurisdiction to enter a default is based on the fact of service, not on the return which is evidence of it. (*Call v. Rocky Mountain Bell Tel. Co.*, 16 Ida. 551, 102 Pac. 146; *Blandy v. Modern Box Mfg. Co.*, 40 Ida. 356, 232 Pac. 1095.)

There is no contention that the mining company was not served with summons as by law provided, nor that its failure to appear, answer and cross-complain within the time prescribed by statute was due to mistake, inadvertence, surprise or excusable neglect. Its failure to do so was intentional. The record discloses that, in failing to respond to the summons, it proceeded on the theory that it was a mere stakeholder of the stock and unpaid dividends in controversy between the other parties litigant, and that it had no interest in the result of the litigation. While the suit was pending the market value of the stock greatly increased and the mining company appears to have been actuated in its desire to answer and cross-complain, after its default had been entered, by a fear that it might become involved in litigation growing out of the changing value of the stock [fol. 239] while it held it pending final determination of the claims to it of the other parties litigant.

Our statute (Sec. 5-905) providing for setting aside defaults does not contemplate that such relief be granted to a defendant who has knowingly and intentionally failed to appear and answer within the time prescribed by law, and who has thereafter changed his mind because of changing circumstances. The Order denying the motion to set aside the default and permit the mining company to answer and cross-complain was not erroneous.

The mining company insists the decree granted relief against it in excess of that demanded in the complaint in violation of Sec. 7-704, which provides: "The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint embraced within the issue." The statutory provision has been frequently applied in this state and relief not prayed for has been held not allowable against a defendant in default for failure to answer.

The relief sought against the mining company, shown by the prayer of the complaint, is that it be restrained and enjoined pending a final determination of the suit, from permitting a transfer of the shares of stock involved and from paying dividends thereon, and that it show cause why it should not be so restrained and enjoined; that it, together with other defendants, account to plaintiffs for any and all [fol. 240] dividends which had been paid on the stock in controversy; also "For a decree of this Court ordering and directing the defendant, Sunshine Mining Company to cancel said certificate now standing of record in the names of the defendants Frances Thinnies and Evelyn H. Treinies, and that said company be directed to issue to plaintiffs a certificate in lieu thereof for 15,299 shares of said capital stock. For such other and further relief as to the court may seem just and equitable."

The provisions of the decree, pertinent to the question now before us, have heretofore been stated. The relief granted against the mining company is not in excess of that prayed for in the complaint, unless it be in that particular wherein the decree enjoins the company and its attorneys, together with the answering defendants and their attorneys, from commencing or taking any further proceedings in the courts of Washington in the matter of the estate of Amelia Pelkes, deceased, or in any Court with reference to the subject-matter of this action, or with reference to the relief given by the decree, except by appeal or application to this Court. Assuming, but not deciding, that the provision of the decree last above referred to is in excess of the relief prayed for in the complaint, when attempted to be applied to the mining company, only the portion of it so attempting to grant relief not prayed for would be void, and that only as against the defaulting defendants.

It does not appear, and has not been urged or even suggested, that the mining company has suffered hardship or [fol. 241] inconvenience by reason of the injunction against commencing proceedings inconsistent with the terms of the decree, and the incorporation therein of that provision, even if void as against it, does not constitute ground for reversal. That provision was intended to prevent further interference with the Courts of Idaho in proceeding with this suit, and will be *functus officio* when the case is disposed of. The order denying the motion to set aside the

default and to permit the mining company to file an answer and cross-complaint is affirmed.

John Pelkes and the mother of respondent, Katherine Mason, were married about 1889. At that time Katherine was 8 or 9 years old, and she lived with her mother and stepfather until she grew to womanhood and was married. From the time of the marriage of Mrs. Mason's mother to her stepfather until the controversy arose which resulted in this litigation Pelkes and Mrs. Mason were very friendly toward each other, and each treated the other as if the relationship between them was by blood instead of by marriage. At the time of, and for many years after their marriage, Pelkes and his wife resided in Idaho where, by their joint efforts, they accumulated property of considerable value. A number of years prior to the death of Mrs. Pelkes, which occurred in 1922, she and her husband removed to Spokane, Washington, where she died and where they resided at the time of her death.

Mrs. Mason testified she had a conversation with her mother, in the fall or winter of 1918, at which appellant, Pelkes, was present. Her testimony is, in part as follows:

[fol. 242] "Well, mother told me that she and John were getting along in years, and they had made their wills, and they wanted me to be familiar with them in case anything should happen to them so I would know how to proceed. And mother was three years older than John and so she always felt that she would die first, and having poor health. So she said that if she died first, why, I was to get half of the property, but if John died first she was to get all of the property and then at her death I was to get it. And in John's will she said they also stipulated that when he died in case mother had died also, why, I was to get it all excepting five thousand dollars that he wanted to divide among some nieces and a favorite sister of his in the old country."

Mrs. Pelkes' Will was probated in the Superior Court of Spokane County, Washington. It was dated and executed September 25, 1918, and after providing for the payment of debts and funeral expenses, contained the following provisions:

II

"I give, devise and bequeath unto my beloved husband, John Pelkes, and to my beloved daughter Katherine

Mason, of Kellogg, Idaho, share and share alike, all my property, real, personal and mixed, wheresoever situate, to have and to hold the same in equal shares.

III

I hereby nominate and appoint my said beloved husband, John Pelkes, executor of this my last will and testament, and it is my will, and I hereby order and direct, that no bonds or other securities shall be required of him and to fully execute this my last will and distribute the estate as herein provided without any application to any court for leave or confirmation and without any intervention of any court unless the same be expressly required by law.

In Witness Whereof," etc.,

Mrs. Mason testified that after her mother's funeral appellant, Pelkes, brought the will to her. She further testified:

[fol. 243] "I went over to the window and opened it and read it. And I said: 'why John, this will isn't made out the way Mama intended it to be.' And he said: 'Why not?' and I said: 'Well, the way it reads I am only entitled to a fourth of the property.' And he says: 'Oh, my goodness! no; that wasn't the way she intended it at all. And I had to read it over and explain to him how it was, and he says: 'Well, that doesn't make any difference; you are going to get your half.'"

Pelkes and Mrs. Mason, the day following the funeral took the will to the court house in Spokane County, Washington, to have it probated. They were there informed it would be necessary for them to have the assistance of a lawyer and they employed Attorney Kinsell to assist in probating the will. Mr. Kinsell testified:

"I don't remember who spoke of it first—whether it was Mrs. Mason or Mr. Pelkes, or whether I mentioned the fact that the property under the will was to be divided three-fourths to Mr. Pelkes and one-fourth to Katherine Mason. One-half of Amelia Pelkes' estate was disposed of under the will, and which one spoke of it first I don't remember, but both said during the conversation that there had been a mistake in the will, and that it was intended

by the wife and mother—Amelia Pelkes—to make an equal distribution or division of all of the property that belonged to the community composed of Mr. Pelkes and his wife Amelia; and I said: ‘Well, we can do one of two things. You can either have the estate administered—probated—the way it is, and three-fourth- distributed to Mr. Pelkes and one-fourth to Katherine Mason, or you can enter into an agreement to have all the property equally divided, or a share of the estate a one-fourth interest, can be conveyed by Mr. Pelkes to Mrs. Mason, and the decree of distribution cover the entire estate by equal distribution.’ This was the agreement between them and both understood it, and both stated that that was the intention of Mrs. Pelkes, and there was no objection, and that they were the two—the only heirs that were concerned.”

With respect to the mining stock belonging to the estate [fol. 244] and the reason it was not included in the inventory, he testified:

“After they had given me the description of the property that appears in the general inventory, I asked them if that were all of the estate, if that were all of the property that Amelia Pelkes owned at the time of her death, in conjunction with her husband, and—well, Mrs. Mason says: ‘Well, what about the mining stock, John?’ and he says: ‘Yes, there’s a lot of mining stock but it hasn’t any value.’ And I said: ‘Well, the mining stock is a part of the estate; if she had an interest in it at the time of her death the mining stock is a part of the estate and should be included in the inventory.’ Well, Mr. Pelkes says: ‘It hasn’t any value, Well, I says, ‘some day it may have value and you should include it in the inventory because if it should have value then by your probate proceedings, if it is included in the administration, you will establish title so that there will be no question as to who owns that stock, and if it has no value, why, it won’t be necessary to put any value on it, but the stock exists and should be included in the estate. And Mr. Pelkes says: ‘well—speaking to Mrs. Mason—‘this stock has no value but if it ever has any value I will give you your half.’ And she seemed to be more or less satisfied with that. I wasn’t however. I thought my duty wasn’t complete until the mining stock was made a part of it, even if it had no value, but he

wouldn't give me the description, so I was unable to put it into the inventory."

The will of Amelia Pelkes was admitted to Probate in the Superior Court of Spokane County, Washington, May 1, 1922. An inventory of the estate was filed in which no mining stock was included. August 8, 1922, an order of solvency was made and entered by the judge of that court in which it was found that the estate was of the reasonable value of \$27,350 and that it was free and clear of all encumbrances excepting unpaid claims and liens in the sum of approximately \$895. That document contains the following:

[fol. 245] "It is therefore ordered and decreed, that said estate is solvent and is entitled to be closed under the terms of the will of the late Amelia Pelkes as a non-intervention will without the further interference or intervention of this court and it is further ordered that said executor shall pay said claims and expenses of administration and distribute said property, as provided by the terms of said will without further intervention of said court."

Thereafter such proceedings were had that a decree of distribution was entered August 9, 1923, wherein the following appears:

"It Is Hereby Ordered, Adjudged and Decreed, That the residue of said estate of Amelia Pelkes, deceased, hereinafter particularly described, and now remaining in the hands of said executor and any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit: John Pelkes, husband, Spokane, Washington, an undivided one-half interest thereof; Katherine Mason, daughter, Kellog, Idaho, an undivided one-half interest thereof.

By this decree the said John Pelkes becomes the owner of an undivided three-fourths interest in the property described in the inventories on file herein, or the proceeds thereof, and the said Katherine Mason becomes the owner of the remaining one-fourth interest undivided, in said property, the said John Pelkes being the owner of a community

or undivided one-half interest of said property at the time of the death of his wife, the said Amelia Pelkes.

The following is a particular description of said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed." (Then follows a description of property in which no mining stock is mentioned.)

Shortly after the death of his Pelkes removed from Spokane, Washington, to Kellogg, Idaho, where he resided for a while, with Mrs. Mason and her husband. Together Pelkes and Mrs. Mason rented a safety deposit box wherein they kept their valuable papers derived from the estate of Amelia Pelkes, including certificates evidencing the shares [fol. 246] of stock here in controversy. After the decree of distribution was entered Pelkes and Mrs. Mason divided the property which they received from the estate each taking possession of approximately one-half thereof, excepting the mining stock. With respect to this division Mrs. Mason testified, in part:

"Well, he said, 'You get a pencil and paper and take down a list of these notes and mortgages, and when the interest is due, and when the notes are due— * * * and he said, 'I have decided to give you the Byrne note and the Interstate Telephone stock, because it will be easiest for you to handle.' And I said: 'Aren't you going to give me the mining stock now?' and he said: 'No.' We had adopted a baby in January of that year, and I was so very busy with the baby; and he said: 'You don't want to bother with the mining stock.' He said: 'You couldn't attend to stockholders' meetings and all that.' He says: 'You let me attend to that; I will attend to that for you.' So I said: 'All right'."

Included in the mining stock was 30,598 shares of Sunshine Mining Company, which prior to her death, was the community property of Amelia Pelkes and John Pelkes her husband. One-half of that stock was subject to her testamentary disposition and the other half became the sole property of her husband, by operation of law.

Mrs. Mason testified to conversations between her and Pelkes wherein he admitted her ownership of an interest in the mining stock; also that when the first dividend was

declared on the Sunshine Mining Company stock, May 20, 1927, he asked her to permit him to retain her part of it because he needed it, and that she consented for him to retain it and keep it as long as he needed it, but told him to keep track of the dividends as they were paid, and of assessments which he had to pay on other mining stock [fol. 247] so she would not be bothered with it. A conversation testified to by Mrs. Mason as having taken place at the time Pelkes removed from the Mason home was as follows:

"He gave me the key to the box and told me he would take his things out. And I said: 'Well, John, don't you think you ought to give me my mining stock now? And he said: 'Now Kate, you know if I give it to you the Doctor (Mrs. Mason's husband) will just have you sell it;' and he says: 'You let me keep it and I'll make you a lot of money on it'."

Pelkes, in his testimony, denied some of the statements attributed to him, and others said to have been made in his presence, with respect to the estate and to a division of the property thereof. His testimony was to the effect that it was agreed between Mrs. Mason and him that she should have one-half of the property, except the mining stock, instead of one-fourth thereof which she was entitled to under the terms of the will; that he was to have the other half of said property and all the mining stock, and that the division was made between them in conformity to that agreement; that he thereafter retained the mining stock as his own and held no part of it in trust for Mrs. Mason.

Pelkes was 83 years old at the time of the trial of this suit in the district court in June, 1935. For several years prior to the trial he had been in ill-health and at times required the care of others. In November, 1923, his nephew, Pierre Thinnes and Frances, his wife, came to this country from Europe and settled in Kellogg, and in February, 1930, Pelkes gave them 12,000 shares of Sunshine Mining Company stock, which, at that time, had a market value of about \$3.50 a share.

[fol. 248] Early in 1931, Pelkes and Mrs. Mason met, in California, appellant Evelyn H. Treinies, a niece of his deceased wife and a cousin of Mrs. Mason. She was at that time about 40 years of age, and he had not seen her since she was a child. During the time the three were together

appellant, Treinies, showed great affection for Pelkes, kissed him frequently and made a proposal of marriage to him. She continued her attentions to him until the time of the trial, and took care of him during some of his attacks of illness. November 8, 1933, appellants, Pelkes and Treinies, entered into a contract wherein it was agreed he should assign to her 16,000 shares of the capital stock of Sunshine Mining Company and, in consideration thereof, she should support, maintain and care for him to the best of her ability during the remainder of his life. Pelkes testified the stock had been delivered to her and she had possession of it. Commencement of this suit followed receipt of information, by respondents, he had disposed of the stock. After the entry of the decree of distribution in the estate of Amelia Pelkes, deceased, in the Superior Court of Spokane County, Washington, August 9, 1923, Pelkes and Mrs. Mason looked upon and treated the probate proceedings as closed, until the commencement of this suit, and on December 19, 1934, when Mrs. Mason filed a petition, in that court and proceeding, wherein she alleged, among other things, that certain property belonging to the estate, including 30,598 shares of the capital stock of Sunshine Mining Company, had not been inventoried or probated, and [fol. 249] that it was an asset belonging to the estate and subject to being probated. She further alleged that Pelkes, as executor, had wasted and embezzled said property and had committed a fraud upon the estate, and that he was incompetent to act, and asked that a citation issue requiring him to show cause why he should not be removed as executor and why letters of administration should not be issued to some competent person. Accompanying the petition of Mrs. Mason was a petition executed by one Easter that letters of administration with will annexed be issued to him.

The citation was issued and Pelkes filed a return and a cross-petition wherein he alleged, among other things, sole ownership in himself, by agreement with Mrs. Mason, of all the mining stock derived from the estate, and the pendency of the suit in Idaho, and he prayed that a temporary restraining order be entered restraining Mrs. Mason from further prosecution of this case; that the restraining order be made permanent upon the conclusion of the litigation in Washington; that he be adjudged to have fully accounted for all the property of the estate of Amelia Pelkes, de-

ceased and that he had delivered to Katherine Mason all the property of such estate to which she was entitled either by the terms of the will or by the voluntary settlement entered into between Mrs. Mason and him. February 2, 1935, the judge of the district court of the First Judicial District of Idaho, wherein this suit was pending, being disqualified to act therein, by order designated and called Hon. Gillies [fol. 250] D. Hodge, Judge of the second judicial district, to hear and determine it. Respondent T. R. Mason who was not a party to the proceeding in Washington in the matter of the estate of Amelia Pelkes, deceased, and who was personally interested in this suit to the extent of his community interest in several thousands of dollars in dividends which had been declared, and in dividends in future to be declared, on the mining stock involved herein, and who was a resident of Idaho and had not been served with the restraining order issued by the Washington Court, nor had he, in any way, submitted himself to the jurisdiction thereof, filed a petition in this suit wherein he prayed for an order of the district court requiring John Pelkes, Evelyn H. Treinies and Katherine Mason, and their agents and attorneys, to show cause why they should not be enjoined and restrained from further proceeding with the litigation pending in Washington in the matter of the estate of Amelia Pelkes, deceased. In filing that petition, and in the proceedings had pursuant to it, he was represented by counsel other than the attorneys who had appeared in the litigation.

May 21, 1933, Judge Hodge, acting as Judge for the first judicial district, made and entered an order that Pelkes and Treinies and Katherine Mason, together with their agents and attorneys, naming them, appear before him, in chambers, in Wallace, Shoshone County, at a time designated, then and there to show cause why they should not be restrained and enjoined during the pendency of this suit, and until the final determination thereof, or until the further [fol. 251] order of the court, from attempting to further prosecute, or do anything in connection with, the matter pending in the Washington court, in the estate of Amelia Pelkes, deceased. Said parties and their agents and attorneys were ordered to desist and refrain from taking any further proceedings in said cause until further order of the Court. While the order was in full force and effect, and was being obeyed by Mrs. Mason and her attorneys, appel-

lants, Pelkes and Treinies, and their attorneys, in violation of it, prosecuted the proceeding pending in the Washington Court to final order, which was dated May 31, 1935.

May 29, 1935, Judge Hodge filed a declaration of his disqualification to try the case, and June 10, 1935, Hon. Miles S. Johnson, Judge of the Tenth Judicial District, was designated to try it. He thereafter proceeded with the trial and September 30, 1935, entered the decree heretofore mentioned wherein was contained the injunctive order restraining and prohibiting Pelkes and Treinies from commencing or taking further proceedings with respect to the subject-matter of the suit in the Courts of Washington or elsewhere except by appeal or application to this court. October 14, 1935, Pelkes and Treinies, filed their notice of appeal to this court in this case, and thereafter, in violation of the injunctive provision in Judge Johnson's decree, they filed in the Superior Court of Washington, for Spokane County, a complaint, verified October 16, 1935, against Katherine Mason and T. R. Mason, and Lester S. Harrison, Walter [fol. 252] H. Hanson, F. C. Keane and Richard S. Munter, their attorneys, and Sunshine Mining Company, wherein they prayed that the defendants, other than the Mining Company, be enjoined and perpetually restrained from asserting or claiming any right, title or interest in or to the shares of stock involved in this suit; from applying for, obtaining, using, or instituting any process, proceeding, suit or action for the purpose of enforcing the decree of the Idaho Court or any of its provisions; from endeavoring in any manner or through any process, proceeding, suit or action to compel the defendant, Sunshine Mining Company, to comply with the terms of the Idaho decree, and from attempting to dissuade the Sunshine Mining Company from or influencing it against, plaintiffs' rights in the shares of stock in litigation; they further prayed that the mining company be enjoined and restrained from delivering any of the stock in litigation, or any dividends accrued or to accrue, to the defendants named in said complaint, or any of them, and that it be required to recognize plaintiffs in said suit in the Washington court as the sole and only owners of the shares and dividends involved.

Respondents herein have moved to strike the brief of appellants, Pelkes and Treinies, on the ground that it does not conform to the rules of this Court. The briefs filed by

said appellants *to not conform exactly to our rules*, but the departure is not sufficiently grave to justify granting the motion and it is, therefore, denied.

[fol. 253] Respondents have also moved to dismiss the appeal of said appellants on the ground that they are in contempt of court by their violation of Judge Hodge's order restraining them from proceeding in the Washington Court in the matter of the estate of Amelia Pelkes, deceased, and by the failure and refusal of appellant, Treinies, to obey the decree of the district court requiring her to surrender, for cancellation, a certificate of stock of Sunshine Mining Company, and by commencement of action, in the Washington Court, by appellants, Pelkes and Treinies, after having filed their notice of appeal, in violation of the decree appealed from, for the purpose of procuring an injunction against the other parties litigant from attempting to bring about enforcement of the decree of the district court.

These appellants attack Judge Hodge's order to show cause and restraining order on the ground that the action wherein it was issued was pending in the First Judicial District and the order was signed by the judge in the Second Judicial District of Idaho. They cite *Callahan v. Dunn*, 30 Ida. 225, 164 Pac. 356, and *Greene v. Edgington*, 37 Ida. 1, 214 Pac. 751. These cases defeat, rather than support their contention. They also attack the affidavit pursuant to which the order was entered. We find it to be sufficient.

No formal accusation of contempt of court has been made against appellants, Pelkes, Treinies or their attorneys, and they insist they cannot be punished unless and until [fol. 254] they have been charged with contempt and adjudged to be guilty thereof. They also insist that, even if they had been adjudged to be guilty of contempt of court, appellants could not be punished therefor by denial of their constitutional and statutory rights to appeal.

As we view this phase of the case we do not deem it necessary to decide whether a formal accusation and adjudication of contempt of court is necessary in order to justify the refusal to grant to a litigant, who has intentionally obstructed the administration of justice in the cause in which he seeks relief, the ordinary remedies provided by law, nor whether, in any case, the right of appeal may be denied because of such misconduct.

Respondents have not assigned as error the order permitting appellant, Pelkes, to amend his answer and therein

plead and rely on the order of the Washington Court procured in violation and defiance of Judge Hodge's restraining order, nor have they assigned as error the order settling the transcript, made over their objection, based on the misconduct of appellants, Pelkes and Treinies and their attorneys. If we have power to deny the right of appeal to a party litigant because of his misconduct, whereby justice has been obstructed, it is a matter within our discretion. It is quite clear the steps taken by appellants, Pelkes and Treinies, in violation of injunctive orders of the district judges, were taken pursuant to advice given them by their attorneys and, assuming we have power to do so, which we do not decide, we are disposed to visit upon these [fol. 255] litigants the harsh penalty of dismissing their appeal.

W. G. Graves, an attorney-at-law residing in Washington, and a member of the firm of Graves, Kizer & Graves, of Spokane, made an affidavit in opposition to the objection of respondents to settlement of the transcript herein, in which he stated, among other facts, that he drafted the complaint in the action filed in the Washington Court wherein injunctive relief was sought. In his affidavit Mr. Graves states:

"I repeat that I, and I alone, am responsible for every allegation contained in that complaint, and I assert in the most solemn manner of which I am capable that there is not an allegation contained in that complaint that was untrue, contemptuous or offensive in any manner, either to this Court or to any person. The utmost that can be charged against the complaint is that it was mistaken in law upon which it was drafted. Certainly it contains nothing but that which I believed to be necessary or germane to the theory of law upon which the complaint proceeded."

After the filing of that complaint and the issuance of a citation to show cause why an injunction pendente lite should not issue as prayed for, which was served on some of the defendants therein named, the mining company filed a supersedeas bond and deposited the stock in controversy, evidenced by certificates thereof, in escrow, whereby the decree appealed from was superseded. Thereafter Pelkes and Treinies dismissed their action in the Washington Court, the apparent purpose of which was to, in effect,

supersede the decree of the Idaho Court without conforming to the laws of Idaho relating to supersedeas.

The appeal will not be dismissed, but we are not to be understood as entertaining the view that blame does not [fol. 256] attach to those who are responsible for the violation of the injunctive orders of the district court.

We invite attention to the fact that the Statutes of Idaho and our rules do not contemplate the admission of non-residents of this state to the bar. (I. C. A. Secs. 3-101, 3-104; rule 2 of the Rules of the Supreme Court of Idaho; rule 2 of the Rules of the Supreme Court and Board of Commissioners of the Idaho State Bar). The privileges of appearing as counsel in our courts is granted to non-resident attorneys, not as a right, but as a courtesy, and it may be said to the credit of the members of the legal profession residing in other states, who have been permitted to appear before our courts, that it has been indeed seldom the confidence thus reposed in them has been violated.

The order of the Washington Court, in the matter of the estate of Amelia Pelkes, deceased, dated May 31, 1935, is relied on by appellants, Pelkes and Treinies, as res judicata of the matter here in litigation.

In his findings of fact the judge of that court, referring to the agreement whereby the estate was divided between the husband and daughter of deceased, found:

"In making this agreement, both parties had in mind the shares of mining stock belonging to the estate, including the shares in litigation, which had not been inventoried or administered on, and both intended and agreed that all those shares should go to and be received by John Pelkes in his sole right as a part of the distributive share of the estate to which he was entitled.

[fol. 257] He further found the partition agreement had been fully performed so far as the division was concerned; that Mrs. Mason had received from Pelkes the property to which she was entitled, and thereafter held and enjoyed it in her sole right, and that Pelkes had taken the remainder of the estate and held and disposed of it as his own. Mrs. Mason was directed to file a receipt, set out in the order, for the property received by her, in which was recited:

"This receipt is a release of all right, title or interest of Katherine Mason in and to all other property of the

estate of Amelia Pelkes, deceased, whether derived from the will of Amelia Pelkes, from the decree of distribution entered in the matter of her estate, or from the agreement between Katherine Mason and Pelkes as executor whereby there was given to her the above described property in lieu of her undivided interest in all the property of the estate."

It was further provided that:

In the event of her failure to comply this order shall stand in lieu of a receipt in those terms filed by her. It is found correct, and shall have the same effect as a receipt signed by her and filed herein and approved by me."

She did not sign the receipt.

The order does not specifically adjudge that the mining stock involved in this suit was the property of Pelkes in his own right, nor that he held it, or did not hold it, in trust for Mrs. Mason. The form of receipt incorporated in it is uncertain, in that it purports to evidence a release by Mrs. Mason of claim to all property of the estate not delivered to her, whether derived from the will of her mother, the decree of distribution, or from the agreement [fol. 258] between her and Pelkes, as executor. If she has any claim to this property by agreement with Pelkes he was not acting in his capacity as executor when it was made, but in his individual capacity. However, when the order is read with the findings of fact it appears to have been the intention of the Judge of the Washington Court to adjudicate and dispose of the matter then in litigation in this suit in the District Court of the First Judicial District of Idaho, and we will proceed on the theory that the order, if the judge who made it had jurisdiction to do so, did decide and dispose of the matter in issue in this case.

Art. 4. Sec. 1 of the Constitution of the United States requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, but this provision does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered, or into the facts necessary to give such jurisdiction; nor are the courts of a state required to give full faith and credit to a judgment rendered by a court of another state which had no jurisdiction of the subject-matter or of the parties. (*Thum v. Pyke*, 8 Ida. 11, 66 Pac. 157;

Thompson v. Whitman 21 L. ed., 897; Reynolds v. Stockton, 35 L. ed., 464; Pendleton v. Russell, 36 L. ed., 574.)

It was stipulated at the trial that the district court, and this court on appeal, may take judicial notice of the statutes of Washington and of the decisions of its supreme court. [fol. 259] I. C. A. Sec. 16-101 lists the matters of which courts in Idaho take judicial notice, and neither the statutes of other states, nor the decisions of their courts, are included in the list. Sec. 16-304, 16-305 and 16-306 of our code prescribed how the laws of other states, and of foreign countries, may be proved. This court has repeatedly held it will not take judicial notice of the laws of another state, and that, in the absence of the pleading and proof of what such laws are, they will be presumed to be the same as are our own. (Moore v. Pooley, 17 Ida 57, 104 Pac. 898; Maloney v. Winston Bros., Co., (on rehearing) 18 Ida. 757, 111 Pac. 1056; Douglas v. Douglas 22 Ida. 336, 125 Pac. 796; Mechanics & Metals Nat. Bank v. Pingree, 40 Ida. 118, 232 Pac. 5; State v. Martinez 43 Idaho 180, 250 Pac. 239; Cummings v. Lowe, 52 Ida. 1, 10 Pac. (2d) 1059; Kleinschmidt v. Scribner 54 Ida. 185, 30 Pac. (2d) 362.)

Certain constitutional and statutory provisions of Washington were alleged by appellant, Pelkes, and the existence thereof was admitted by respondents in their pleadings. These quoted provisions are held to state the laws of Washington, so far as they are applicable to this case, but with respect to matters to which they are not applicable the laws of that state will be assumed to be the same as those of Idaho.

A Washington constitutional provision, so alleged and admitted, provides, "The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property * * * and in all other cases in which the demand or the value of the property in controversy amounts to one [fol. 260] hundred dollars, * * * of all matters of probate * * * and for such special cases and proceedings as are not otherwise provided for * * *." It appears from the Washington Statutes, pleaded and admitted that superior courts have original jurisdiction of all matters of probate and, in the exercise thereof, "shall have power to probate or refuse to probate wills, appoint administrators, executors * * * and administer and settle all such estates, award processes and cause to come before them all

persons whom they may deem it necessary to examine, and order and cause to be issued all such writs as may be proper or necessary, and to do all things proper or incident to the exercise of such jurisdiction." The Washington law, so shown, further provides for closing the estate and discharging the executor or administrator upon production of receipts from beneficiaries or distributees for their portions thereof, and grants to the court authority to make partition, distribution and settlement of all estates. The law of Washington, in the particulars pleaded and admitted, grants to the superior courts of that state the same powers, in probate matters, as are granted to probate courts in Idaho, by our laws.

That the Superior Court of Spokane County, Washington, had jurisdiction to probate the estate of Amelia Pelkes, deceased, is not questioned. After admitting the will to probate and proceeding therewith to and including the entry of decree of distribution, whereby all property remaining in the hands of the executor was distributed to the beneficiaries named in the will, in undivided interests, and after [fol. 261] more than 11 years had elapsed from the date of the decree of distribution, and while a suit was pending in Idaho to establish a trust with respect to a portion of the property derived from the estate, did that court have and retain jurisdiction to try and determine the question as to whether the trust existed?

The record does not disclose what the law of Washington is with respect to this question. Proceeding on the theory that it is the same as in Idaho, we hold the Washington court did not have jurisdiction to try and determine the question as to whether Pelkes held the stock involved in this suit in trust for Mrs. Mason, for the following reasons:

1. The entire estate of Amelia Pelkes, deceased, was devised and bequeathed to her husband and daughter by a non-intervention will, and after the order of solvency and decree of distribution were entered no other or further order of the court was necessary to pass title to them nor to place them in possession and enjoyment of the property, to do with as they saw fit, and the superior Court acting in probate, had fully performed its functions and exhausted its powers with respect to it;

2. The probate of an estate is a proceeding in rem. (*Harkness v. Utah Power & Light Co.*, 49 Ida. 756, 291 Pac. 1051;

Abels v. Frey (Cal.) 14 Pac. (2d) 594; **Bancroft's Probate Practice**, Vol. 1, p. 81, Sec. 40.) The res had already been distributed and was no longer a part, or asset, of the estate and the Probate court had no further jurisdiction thereof.

[fol. 262] The mining stock here in question was duly and regularly distributed by the decree of the Washington Court sitting in Probate. That decree, as heretofore pointed out, after referring to the property therein described, included and distributed "any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest."

The Sunshine Mining Company stock here in controversy aggregating 30,598 shares, belonged to the estate at the time of the decree of distribution and was treated by the executor and beneficiary, Pelkes and Mrs. Mason, the other beneficiary named in the will, as a part of the estate so distributed. They thereafter brought all personal property derived from the estate, including the certificates of shares of that mining stock, to Idaho and entered into an agreement for the division thereof and it was divided. The only disagreement between them is Pelkes insists it was agreed he was to have all the mining stock while Mrs. Mason insists the agreement was she was to have half of it. The distribution of property which both parties claim was made, being one-fourth to Mrs. Mason and three-fourths to Pelkes, included that made under the omnibus clause of the decree which distributed "any other property not now known or described," and disposed of the entire estate, including the mining stock, and both parties so understood and agreed. No controversy existed, or now exists, between the parties over the distribution of the property, and the only dispute is as to the terms of the agreement between them, after the distribution was [fol. 263] ordered and made whereby it was divided. The mining stock, having been distributed, was no longer property of the estate and the Washington Court, sitting in probate, did not have jurisdiction of it.

3. A decree in probate, distributing an estate, is a final adjudication, subject to appeal, of the rights of the distributees, to receive the property awarded to them, but a court of probate has not jurisdiction to decide questions of title, to the property distributed, arising out of contracts between the distributees after the decree is entered.

This court said in *Connolly v. Probate Court* 25 Ida. 35, 136 Pac 205:

"Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate."

The Court further said in that case:

"The judgment of the probate court in probate matters is made appealable by the provisions of Sec. 4831 Rev. Codes (I. C. A. Sec. 11-401). The Probate court is not given jurisdiction, under the laws of this state, to set aside the decree of distribution entered upon a full hearing of which the entire world had legal notice. That proposition was fully considered in *Donovan v. Miller*, Supra. (12 Ida. 600, 88 Pac 82, 9 L. R. A. (N. S.) 524, 10 Ann Cas. 444). While the probate court, under the provisions of Sec. 21, Art 5 of the constitution, is made a court of record and is given original [fol. 264] jurisdiction in all matter of probate, settlement of estates of deceased persons and the appointment of guardians, its orders and judgments in regard to those matters cannot be attacked collaterally, but may be corrected on appeal. The constitution does not make probate courts courts of equity in which equitable relief may be granted long after the time for appeal has passed."

(See, also, *Parr v. Reyman* (cal.) 12 Pac. (2d) 440; In re *Thompson's estate* (Wash) 188 Pac 784.)

In the case last above cited a daughter of deceased had assigned to her father, who was administrator of her mother's estate, all her interest therein, he agreeing to pay her, upon distribution of the estate, an amount equal to what her distributive share would have been had the assignment not been made. She appealed from the decree of distribution and the Supreme Court of Washington held her appeal could not be maintained, saying: "Her contract with Thompson provided for the compensation she should receive. It was a private matter, and the probate court was neither bound nor

entitled to in any manner consider it. Her remedy is solely on her contract."

Superior Courts in Washington have jurisdiction in equity, as shown by the record, which probate Courts in Idaho have not, but it does not appear that a Superior Court, in a probate proceeding, has equitable power to relieve a party from a decree of distribution which has become final and fully executed, nor to make and enter an order that property thereby distributed had, or had not, thereafter, by agreement between the parties, been placed and held in trust by one of them for the use and benefit of the other.

Assuming the laws of Washington are the same as those of Idaho with respect to this matter, we hold that the su-[fol. 265] perior court of Spokane County was without jurisdiction to make and enter its order determining whether or not a trust existed and who was the owner of the stock in controversy, and that it is not *res Judicata* of the matter presented to the district court, and here, for determination.

This conclusion makes unnecessary a discussion of the effect on the jurisdiction of the Washington court, of the pendency of litigation in Idaho, involving the existence of the trust.

The trial judge found Pelkes and Mrs. Mason divided all the property derived from the estate, including the stocks, between them and agreed her interest in the mining stocks should be held by him, as trustee, to be transferred to her on demand if and when said stocks, or any of them, should become valuable, and to account to her for dividends thereon. He further found Pelkes did not purchase from Mrs. Mason, or otherwise acquire, her interest in the mining stock involved herein, but held the same in trust for her. These findings are fully supported by the evidence and are approved.

On the question of the extent of Mrs. Mason's interest in the stock the judge found;

"That evidence admitted without objection established that John Pelkes and Katherine Mason entered into an arrangement for the equal division of the entire property of the marital community composed of John Pelkes and Amelia Pelkes, and that after the entry of the decree of distribution they so divided the property, including the mining stocks,

but that the parties were acting under a mistake of fact in assuming that the intention of Amelia Pelkes could be established in any other way than by the terms of the plain and unambiguous will, and the evidence of said arrangement and division is incompetent; * * *."

[fol. 266] The above quoted finding is evidently based on a mistaken theory that the intention of Amelia Pelkes as to the disposition of her property is material to a decision of the case, and that the beneficiaries of her will were bound by the terms of it in their division of the estate between them.

There is no question as to what the will provided, nor that, according to its terms, one-fourth of the entire community property of John and Amelia Pelkes was to go to Katherine Mason and three-fourths thereof was to go to Pelkes. Nor is there any question that it was distributed to them, according to the terms of the will, in undivided interests. That the property so distributed was thereafter divided by them is not in dispute, and it is not contended that the division was made by mistake as to the wishes of Amelia Pelkes, nor is it material if the rules of evidence were not followed by them in ascertaining what her wishes were. The division was not a judicial proceeding, nor was it in any way governed by judicial procedure.

There is no contention that fraud was practiced or that mistake occurred in making the division, the controversy is as to the terms of the agreement, voluntarily entered into between the parties with full knowledge of the facts, by which the division was made. Respondents' contention is that 15,299 shares of Sunshine Mining Company stock were, by the agreement, held in trust for Mrs. Mason by Pelkes and were by him transferred in violation of the trust to Treinies, who took them with knowledge of it. This contention is sustained by the evidence. Appellants, other than the mining company, contend that said stock, and all of it, [fol. 267] became the property of Pelkes in the division of the estate of Amelia Pelkes deceased, and was not held in trust by him for Mrs. Mason. This contention is not sustained by the evidence.

Conclusions of law, consistent with the findings were made and the decree, heretofore referred to, was entered.

The case is remanded to the District Court with direction to amend the findings of fact and conclusions of law to con-

form to the views herein expressed and to amend and modify the decree and therein award to Katherine Mason 15,299 shares of the capital stock of Sunshine Mining Company in controversy herein, and adjudge respondents to be the owners of the dividends accrued and accruing thereon since August 4, 1934, and require appellants, other than Sunshine Mining Company, to account for all dividends collected by them on said stock and award judgment against them severally, in favor of respondents, for any balance found to be due on account thereof. Costs are awarded to respondents.

Givens, C. J. and Budge and Ailshie and Holden J. J. concur.

[fol. 268] There was also included in said exhibit No. 1 and considered by the court the findings of fact and conclusions of law of the District Court of the First Judicial District of the State of Idaho on the 18th day of August, 1936, upon receipt of the remittitur from the Supreme Court of the State of Idaho, which findings of fact and conclusions of law are as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the court sitting in equity on the 22nd day of June, 1935, the defendant Treinies appearing by her counsel of record herein, and all of the other parties appearing in person and by their respective counsel of record, said defendant Sunshine Mining Company having appeared at the trial of said cause upon a motion to set aside a default theretofore entered, witnesses having been sworn and oral and documentary evidence having been adduced, the cause having been taken under advisement and the court having heretofore made and entered herein its finding of fact, conclusions of law, and decree, and said cause having heretofore been appealed to the Supreme Court of the State of Idaho, the remittitur in said cause having heretofore come down from the Supreme Court of the State of Idaho, and in the judgment of the latter court the findings of fact, conclusions of law and decree heretofore entered by the court were ordered modified and changed, all of which more fully appears from the records and files in said cause, and it further

appearing that no additional testimony or documentary evidence is necessary in order for the court to decide said cause, and the court being fully advised in the premises, [fol. 269] now makes, renders and enters its findings of fact and conclusions of law herein as follows:

Findings of Fact

I. That the complaint herein was filed upon the *the* 4th day of August, 1934; that all the defendants were duly and regularly served with a copy of the complaint and summons and a temporary restraining order therewith enjoining the transfer of the stock of the Sunshine Mining Company hereinafter mentioned; that defendants Thinnies, Treinies and Pelkes filed their answers in the case on or before the 1st day of March 1935; that the default of the defendant Sunshine Mining Company was duly and regularly entered on the 29th day of August, 1934, and that said defendant thereafter appeared generally upon a motion to set aside the said default, which motion was denied, and that all of the parties have appeared generally; that the temporary restraining order issued the 4th day of August, 1934, enjoining the transfer of certificate No. 2777-A for sixteen thousand (16,000) shares of the capital stock of defendant Sunshine Mining Company standing in the name of defendant Treinies together with other stock, was thereafter made permanent pendente lite and is in effect at the time of the making of these findings as to the said certificate standing in the name of defendant Treinies; that upon the trial of the case plaintiffs and all of the defendants save the defendant Treinies appeared in person; that prior to the reception of evidence the action was dismissed as to defendants Thinnies by stipulation and order of this court without affecting the rights of any of the other parties.

II. That plaintiffs are and at all the times herein mentioned [fol. 270] were husband and wife, and that defendant Sunshine Mining Company is a corporation organized and existing under the laws of the State of Washington, with its principal office in Yakima in said state, but lawfully doing business in the State of Idaho in compliance with the constitution and laws of the latter state relating to foreign corporations.

III. That defendant Sunshing Mining Company is engaged only in the business of mining; that all of its mining properties are situate in Shoshone County, Idaho, and that all of its business is carried on in said county, saving only matters relating to its corporate records and the registration and transfer of its stock, and that for the latter purposes the corporation is a Washington corporation. The assistant treasurer, who is also the statutory agent of the corporation, resides in the State of Idaho, and that the whole tangible and ponderable substance of the corporation is in this state.

IV. That about the year 1890 the defendant Pelkes in Shoshone County, Idaho, married Am-lia Goetz, a widow with two daughters, one of whom died without issue, and the other of whom is the Plaintiff Katherine Mason, who was at the time of the marriage about eight (8) years old; that the family resided in Shoshone County, Idaho, for some sixteen (16) or eighteen (18) years after the marriage, and Katherine Mason was raised in the Pelkes' home and there resided until her own marriage, and that her relationship with John Pelkes was one of such confidence and affection as ordinarily exists between parent and child, and so continued until the year 1934.

[fol. 271] V. The defendant Pelkes and his said wife acquired certain mining interests in prospects in Shoshone County, Idaho, and that in 1920 by transfers of these interests Pelkes acquired certificate No. 111 for thirty thousand five hundred ninety-eight (30,598) shares of capital stock of the defendant Sunshine Mining Company, which was the community property of himself and his said wife.

VI. That on or about the 19th day of April, 1922, Amelia Pelkes died testate and that her said will was duly and regularly filed for probate in the superior court of the State of Washington for Spokane County sitting in probate; that the said will was a non-int-rvention will; that the same was admitted to probate as a non-intervention will; that an inventory in due and regular form was duly and regularly filed in the cause, and that by the terms of the said order and by the law defendant Pelkes, named as the sole executor without bond, was required and authorized to settle and distribute the estate without the intervention of the court, as is provided by the law of Washington in

the case of non-intervention wills after the entry of an order of solvency.

VII. That such proceedings were thereafter had, including the entry of an order of solvency, that the estate was completely probated, and that on August 9, 1923, a final decree of distribution was duly and regularly entered distributing all of the property of the estate, including the property not known or described, to John Pelkes and Katherine Mason as sole heirs in the proportions provided by the will.

[fol. 272] VIII. That immediately after the death of his wife, John Pelkes returned to Kellogg, Idaho, and took up his residence in the home of the plaintiffs, where he continued to reside until 1926; that after the entry of the decree of distribution, John Pelkes, at Kellogg, Idaho, as executor of his wife's estate, delivered into the possession and control of himself and Katherine Mason, as the sole heirs and distributees of the estate, manual possession of all chattels thereof and belonging thereto, and constructive possession of all the real property, in exact and literal performance of the terms of the said decree of distribution. That said decree of distribution has never reversed, modified, or annulled, and that in accordance with the law of the State of Washington the time within which to reverse, modify or annul the same had long since expired prior to the institution of this action.

IX. That thereupon the said John Pelkes and Katherine Mason, at Kellogg, Idaho, divided between themselves in severalty all of the property of the estate consisting of the entire community property of John and Amelia Pelkes, and including the mining stocks of the said estate, which were delivered into the joint possession of the said distributees at Kellogg, Idaho.

X. That as to the mining stocks the distributees then and there agreed that the legal title thereof, which stood in the name of John Pelkes, should remain in his name, but that Katherine Mason's undivided interest should be held by him as trustee for her; that the stocks had then only [fol. 273] a prospective value and that it was agreed between the said distributees that if and when the stocks or any of them should acquire any value, the said Pelkes would upon the demand of Mrs. Mason transfer to her her

undivided interest therein and account to her for the dividends thereon, and that all of the securities divided between the said distributees in severalty and the said mining stocks were deposited in a safety deposit box in a bank at Kellogg, Idaho, taken in the joint names of the two parties and to which both had keys and from time to time had access.

The evidence discloses that John Pelkes and Katherine Mason entered into an agreement for the equal division of the en-ire community property of John Pelkes and Amelia Pelkes, deceased. Such division was actually made between the parties hereto and the said Katherine Mason did place the same in trust as aforesaid with the said John Pelkes and the court find- that said facts as above set forth were established by competent evidence and that Katherine Mason actually became owner by reason of such agreement of one-half ($\frac{1}{2}$) of the total of said mining stocks, to-wit: Fifteen thousand two hundred ninety-nine (15,299) shares of the capital stock of Sunshine Mining Company, which stock is now represented by certificate numbered WN2868, evidencing 7,600 shares; WN2869, evidencing 700 shares; WN628, evidencing 50 shares and WN629, evidencing one share, all standing of record with the clerk of the above-entitled court in the name of the defendant Evelyn H. Treinies, and certificates numbered MN2849 for 7,600 shares [fol. 274] and WN615 for 49 shares of the capital stock of Sunshine Mining Company in the name of plaintiff Katherine Mason.

XI. That the stock of the Sunshine Mining Company began to acquire value about the year 1927 and that small dividends began to be paid thereon; that defendant Pelkes requested that he be allowed to keep these dividends for his own use and that Katherine Mason granted him permission so to do upon the understanding that he would keep an account of the dividends and would account to her for them.

XII. That from time to time thereafter, Katherine Mason mentioned to John Pelkes her interest in the stock of the Sunshine Mining Company and the other mining stocks held in trust by him as aforesaid; that the trust under which the stocks were held by John Pelkes was at no time denied or repudiated by him but on the contrary was admitted, and that when the same was mentioned, the said Pelkes expressed his purpose and intention of

performing the trust and lulled plaintiff Katherine Mason into repose by reason of her confidence and trust in him.

XIII. That before the 27th day of October, 1931, defendant Pelkes transferred twelve thousand (12,000) shares of the said stock of the Sunshine Mining Company to defendant Pierre Thinnes; that Katherine Mason learned that some transfer had been made by Pelkes to Thinnes without learning the amount, and she made inquiry of Pelkes as to the transaction and was informed by him that he had transferred only a small portion of the stock and that he had retained all of the stock which he [fol. 275] held in trust for her and a large portion of his own stock, and that Katherine Mason believed and relied upon such representations.

XIV. That until the year 1926, Pelkes lived in the home of the plaintiffs at Kellogg, Idaho, as a member of the family and without paying any compensation therefor, and that during that time he was treated as a member of the family, and the relationship between himself and plaintiff, Katherine Mason was such as ordinarily exists between father and daughter; that in the latter part of 1926 Pelkes took up his residence in the home which he had built for his nephew, Pierre Thinnes, in Kellogg, Idaho; and that after the transfer to Pierre Thinnes of the stock of the Sunshine Mining Company herein above mentioned, defendants Thinnes moved to California and that thereafter defendant Pelkes removed to California, returning however, annually to Kellogg until the year 1934.

XV. That in the year 1931 defendant Pelkes, returning from California with plaintiff, Katherine Mason, met defendant Treinies at a hotel in Tacoma; that said defendant is a cousin of Katherine Mason and that defendant Pelkes met the said defendant only once before, when she was a girl of twelve or thirteen years of age; that at the time of the meeting in Tacoma defendant Treinies was a woman of approximately forty-two (42) years of age and defendant Pelkes was a man nearly eighty (80) and at that and other times the said defendant Treinies was advised by plaintiff Katherine Mason that Pelkes was not a rich man and that his income was derived mostly from [fol. 276] stock of the Sunshine Mining Company which defendant Pelkes held in trust for said plaintiff.

XVI. That thereafter defendant Pelkes resided at various places in Oregon and California, where he was accompanied by defendant Treinies, and that on or before the 13th day of November, 1933, the defendant Pelkes transferred to the defendant Treinies a business block which he owned in Kellogg, Idaho, and which he had acquired shortly theretofore for a consideration of nine thousand dollars (\$9,000.00), and likewise transferred to defendant Treinies a certificate for sixteen thousand (16,000) shares of the capital stock of Sunshine Mining Company, of which fifteen thousand two hundred ninety-nine (15,299) shares represented and was the portion belonging to Katherine Mason secured from her mother's estate and held by defendant Pelkes in trust, and of which defendant Treinies had full knowledge and notice, and that defendant Treinies took the said stock with full notice and knowledge that as to fifteen thousand two hundred ninety-nine (15,299) shares thereof defendant Pelkes had no title and that the purported transfer was a fraudulent transfer as against the plaintiffs.

XVII. That after the issues had been joined in this case before this court and on or about the 19th day of December, 1934, plaintiff Katherine Mason, acting under a mistake of law and fact, filed her petition in the Superior Court of Spokane County, Washington, sitting in probate in the matter of the estate of Amelia Pelkes, deceased, alleging the existence of unadministered assets of the said estate in-[fol. 277] cluding the stock of the Sunshine Mining Company herein referred to, and other assets, and alleging that Pelkes, as executor, had wasted or mismanaged the estate and that he had not been finally discharged as executor, and praying for the administration of the supposed unadministered assets and the appointment of an administrator de bonis non therefor and for an accounting and for the removal of the said Pelkes as executor; that to said petition Pelkes answered, denying the existence of any unadministered assets and that he had wasted or embezzled any part of the estate, and filed a cross-petition alleging that as executor he had fully and completely distributed the estate to the distributees named in the distribution and in accordance therewith, and that no assets of the estate remained in his hands, and alleged further that he had not procured his discharge as executor because he was not advised that under the law of Washington

it was necessary for him to secure and file a receipt from Katherine Mason, and further alleging that after the distribution of all of the said property pursuant to the said decree of distribution he had purchased from the plaintiff Katherine Mason for a valuable consideration all of her interest in the mining stocks owned by the said estate and particularly the Sunshine Mining Company stock which is the subject matter of this controversy; that prior to the filing of the said cross-petition, the said Pelkes had filed an answer in the District Court of the First Judicial District of the State of Idaho for Shoshone county, alleging and submitting for adjudication the selfsame controversy [fol. 278] which by his cross-petition he sought to submit for adjudication to the Superior Court of Spokane County, Washington, sitting in probate.

XVIII. That after the filing of the said answer and cross-petition of defendant Pelkes in the said Superior Court, plaintiff Katherine Mason sought to dismiss her petition and to withdraw from the court, and that defendant Pelkes successfully resisted her withdrawal and sought to press in the superior court for an adjudication of his purported title to the said mining stock set out in his cross-petition.

XIX. That thereupon and on May 21, 1935, the plaintiff T. R. Mason applied to the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone for a restraining order restraining the plaintiff Katherine Mason and her agents and attorneys and also restraining the defendants John Pelkes and Evelyn H. Treinies from prosecuting or attempting to prosecute any controversy with reference to the title to the stock of the Sunshine Mining Company which had theretofore been submitted to the District Court, and that upon said application being made, this court made and issued its restraining order restraining the defendant Pelkes together with his agents and counsel and also restraining the plaintiff Katherine Mason, together with her agents and attorneys, from further proceeding in said superior court in an attempt to adjudicate the title to the stock of the Sunshine Mining Company, which controversy had theretofore been submitted to this court, and that said restraining [fol. 279] ing order was duly and regularly served upon all parties interested therein and that said defendants together with the plaintiff Katherine Mason, had notice

prior to the 31st day of May, 1935, that said restraining order was in force and effect.

XX. That notwithstanding the service and notice of the restraining order of the said district court, and contrary thereto and in violation thereof, the said Pelkes and his counsel proceeded in the Superior Court of Spokane, Washington, in their attempt to procure from said court a purported adjudication of the title of defendant Pelkes, and his assigns, to the said stock of the Sunshine Mining Company; and that on the 31st day of May, 1935, and in the absence of the plaintiff Katherine Mason, defendant Pelkes and his counsel procured from the said Superior Court an order entitled "Finding and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor," wherein the said superior court, among other things, found that by partition between defendant Pelkes and Plaintiff Katherine Mason after entry of the decree of distribution in the estate of Amelia Pelkes, defendant Pelkes acquired all of the mining stocks of the said estate including the stock of the Sunshine Mining Company in controversy in this action, and whereby the court ordered that the said partition "is in all respects approved and is adopted as a settlement, partition and distribution originally made under the approval and order of this Court, and effect shall be given to it as though it were embodied in the decree of distribution of this court," and said Superior Court of Washington specifically found and held that [fol. 280] "full distribution of the property of the estate has been made to the beneficiaries entitled thereto."

XXI. That the said Superior Court of Spokane County, State of Washington, was without jurisdiction to make said order and finding last referred to or any part thereof; that the defendant Evelyn H. Treinies and the defendant Sunshine Mining Company were not parties to said estate proceedings, nor was the defendant John Pelkes, acting in his capacity as an individual, a party thereto, and that the plaintiff T. R. Mason never was a party to said estate proceedings, nor did any of said last-named parties appear in said estate proceedings in a capacity other than that mentioned with reference to the said defendant John Pelkes, and the court finds that said above named and so-called "Finding and Order Approving Partition, Correcting Receipts for Distributive Shares, and Discharging Ex-

ecutor" was secured by the defendant John Pelkes with the aid and assistance of defendant Evelyn H. Treinies in violation of the Order of this court issued under date of May 21, 1935, and the court finds that said restraining order issued out of the above entitled court as above described was a valid order; that a sufficient application for the issuance of said order was made and that a proper bond was given therefor and that said restraining order actually enjoined and restrained all of the parties to this action from taking any further proceedings therein, and the court finds that said proceedings taken after the 22nd day of May, 1935, in said estate of Amelia Pelkes, deceased, in the Superior [fol. 281] Court of the State of Washington, in and for Spokane County, were taken in violation of the order of this court and actually constituted a contempt of a valid order of this court, and that the Honorable Gillies D. Hodge, the judge who made said order, actually had jurisdiction to make the same.

XXII. That plaintiffs until the fall of 1933 had implicit confidence in defendant Pelkes; that they had not, nor did either of them, have any knowledge or notice or means of knowledge or notice of said defendant's intention to violate or repudiate the trust hereinabove mentioned, and that said defendant prior to the fall of 1933 did not violate or repudiate the said trust, not do any act or thing which was brought to the notice of the plaintiffs or either of them, which would put them upon inquiry; that plaintiffs made no demand upon defendant for the said stock until the fall of 1933, and that at the time the plaintiff Katherine Mason demanded said stock from the said defendant John Pelkes, she was again lulled into repose by the assurance of the said defendant John Pelkes that he would go to Wallace the next day and see his attorney with reference to protecting her right, and upon his return from Wallace the next day he again assured the plaintiff Katherine Mason that the whole matter had been taken care of and that she was fully protected; that the said Katherine Mason still retained a feeling of confidence and trust in the said defendant John Pelkes and did not know until the month of July 1934, that the said John Pelkes had violated his trust [fol. 282] and had caused said stock to be transferred as aforesaid; that plaintiffs' claims herein are not barred by laches or by the statute of limitations.

XXIII. That Katherine Mason is the owner of and entitled to the possession of fifteen thousand two hundred ninety-nine (15,299) shares of said stock of the Sunshine Mining Company, and that plaintiffs as a community are the owners of and entitled to receive all dividends accumulated thereon since the 4th day of August 1934; that between the 9th day of August, 1923, and the 4th day of August 1934, the defendant Pelkes and the defendant Treinies have received \$19,429.73 in dividends upon said shares of stock owned by the plaintiff Katherine Mason; that Katherine Mason and T. R. Mason are entitled to require the said defendants and each of them to account to her for all of said dividends so paid on said fifteen thousand two hundred ninety-nine (15,299) shares of stock between the 9th day of August 1923, and the 4th day of August, 1934, and the Court finds that said dividends so paid to the defendants John Pelkes and Evelyn H. Treinies on said 15,299 shares of stock in said mining company to be the sum of \$19,429.73, and plaintiffs are entitled to judgment against said defendants and each of them for said sum.

XXIV. That on the 19th day of December 1934, when Katherine Mason filed in the Superior Court of the State of Washington her petition in the matter of the estate of Amelia Pelkes, deceased, hereinabove referred to, the estate of Amelia Pelkes had been completely distributed for [fol. 283] more than ten (10) years and after its distribution the entire estate had been divided and delivered in severalty to John Pelkes and Katherine Mason, as the sole heirs of the estate, pursuant to a settlement made between them as the heirs, and fully performed after the decree of distribution in said estate had been entered; that at the time of the filing of the petition, there were no unadministered assets of the said estate in possession of John Pelkes, as executor; that there was no subject-matter of the said estate over which the superior court of Washington, sitting in probate, had or could acquire jurisdiction; that the said superior court had no jurisdiction to approve or disapprove the settlement and division of the estate theretofore made between the heirs; that it had no jurisdiction over the parties to the controversy before this court nor the subject-matter of said controversy, to-wit, that portion of stock of the Sunshine Mining Company, the equitable title to which was owned by plaintiffs, and the legal title of which

stood in the name of defendant Treinies, a resident of California; and that all of the findings, orders and decrees of the said Superior Court, sitting in Probate, in said proceeding had subsequent to the filing of the said petition of Katherine Mason, saving the discharge of the executor, are and were without jurisdiction, and null and void.

XXV. The court further finds that John Pelkes did not purchase from Katherine Mason or otherwise acquire Katherine Mason's interest in the Sunshine Mining Company stock or any of the mining stocks distributed to John Pelkes [fol. 284] and Katherine Mason, as sole heir of Amelia Pelkes, deceased, by decree of distribution of the Superior Court of the State of Washington, and that he did not become the owner of Katherine Mason's interest in the said stocks, or any of them, but held her interest in trust as hereinbefore found.

XXVI. This is an action upon a trust. The trust arose out of the settling of an estate by the heirs after a decree of distribution years ago, and this court alone has jurisdiction of the parties and the subject-matter, and its jurisdiction having attached, it could not be divested and was not divested or in anywise impaired by proceedings thereafter had in the courts of Washington.

XXVII. The Court further finds that under the non-intervention will of Amelia Pelkes and under the law of Washington and under the decree of distribution entered by the Superior Court sitting in Probate, John Pelkes, as executor of the estate of Amelia Pelkes, deceased, was fully and completely discharged and exonerated of his trust as executor upon the delivery to the heirs of the deceased of the entire property of the estate as directed by the decree, and that a formal record of his discharge in the said superior court, sitting in probate, was unnecessary, and had it been made, would have been immaterial in this case.

XXVIII. That this was and is a proper cause wherein a temporary restraining order and/or injunction and a restraining order and/or injunction pendente lite should issue, and that there was sufficient basis therefor, and the same was regularly and properly made.

[fol. 285] XXIX. That the plaintiffs and defendants stipulated in open court that the Honorable Miles S. Johnson,

Judge, be authorized and empowered to sign any orders in connection with the above entitled cause at his domicile in Lewiston, Idaho, or any place within the State of Idaho, and that said stipulation and agreement thereupon received the approval of the court.

XXX. That the stock of the Sunshine Mining Company has a fluctuating value, and between the time of the institution of this suit and the trial thereof the value fluctuated from approximately six dollars (\$6.00) to approximately twenty-five dollars (\$25.00) a share.

XXXI. The court finds that the Sunshine Mining Company heretofore and in lieu of certificate No. 2777-A for sixteen thousand (16,000) shares of stock involved in this action, issued and delivered to the Clerk of the above-entitled court certificate No. WN2849 for seven thousand six hundred (7,600) shares, and certificate No. WN615 for forty-nine (49) shares, both of said certificates being in the name of Katherine Mason and also delivered to the said clerk of the above entitled court certificate No. WN2868 for Seven thousand six hundred (7,600) shares, certificate No. WN2869 for seven hundred (700) shares, and certificate No. WN628 for fifty (50) shares, and certificate No. WN629 for one (1) share of the capital stock of said Sunshine Mining Company and all of said latter-mentioned certificates being in the name of Evelyn H. Treinies, one of the defendants in the above entitled cause; and the court further finds that the defendant Sunshine Mining Company has heretofore put up a surety bond guaranteeing all of the dividends which have been paid upon said Sunshine Mining Company stock since the 4th day of August 1934.

XXXII. The Court finds that its action in heretofore denying the application of the defendant Sunshine Mining Company to vacate, set aside and hold for naught the default entered against said defendant on August 29, 1934, was proper and the court finds that at all times from and after said 29th day of August, 1934, said defendant Sunshine Mining Company has been and it now is in default in the above entitled cause.

XXXIII. The court finds that the purported judgment made in the Superior Court of Spokane County, State of Washington, on the 31st day of May 1935, was not and is not

res judicata as to this action and the court further finds that there is no evidence introduced by any of the parties to the above entitled action which would disclose that said action was in any manner, shape or form res judicata in the present proceeding and the court finds that it is not violating the provisions of Article IV. Section 1, of the Constitution of the United States of America in refusing to give full faith and credit to said judgment so made on the 31st day of May 1935 and that construing said purported final judgment so made on the date last aforesaid, this court is required to and does construe the same in accordance with and subject to the laws of the State of Idaho and that under the laws [fol. 287] of the State of Idaho, said purported decree now is and at all times herein mentioned has been void and of no effect whatsoever.

Conclusions of Law

As matters of law from the facts found the court concludes:

That Katherine Mason is the owner of certificate No. WN2849 for seven thousand six hundred (7,600) shares, and certificate WN615 for forty-nine (49) shares, both of which said certificates have been deposited with the Clerk of the above entitled court for the purpose of superseding the judgment made in the above entitled cause, and that judgment should be entered in the above entitled cause ordering, adjudging and decreeing her to be the owner of said certificates as above described, and that judgment should also be entered in said cause adjudging the said Katherine Mason to be the owner of certificate No. WN2868 for seven thousand six hundred (7,600) shares, and certificate No. WN628 for fifty (50) shares, both of which said certificates are on deposit with the clerk of the above entitled court, and said clerk should be ordered and directed to forthwith assign said certificates to Katherine Mason and deliver the same to her, said assignment carrying the seal of the above entitled court, the clerk endorsing said certificates last above mentioned with the defendant Evelyn H. Treinies' name, and the defendant Sunshine Mining Company should be ordered and directed to recognize the assignment of said certificates last above described by the Clerk of the above entitled court and upon surrender of said certificates, said [fol. 288] company should be ordered and directed to issue

new certificates in lieu thereof to the said Katherine Mason. That judgment further be entered ordering and directing said defendant Sunshine Mining Company to forthwith pay to the above named plaintiffs, Katherine Mason and T. R. Mason, all dividends which have been declared on said fifteen thousand two hundred ninety-nine (15,299) shares of stock from and after the 4th day of August 1934.

The Court finds that judgment should be entered in favor of Katherine Mason and T. R. Mason and against the defendants Pelkes and Treinies for the sum of \$19,429.73, which is the amount of dividends which were paid on said 15,299 shares of stock in said Sunshine Mining Company to the said defendants between the 9th day of August 1923, and the 4th day of August 1934.

That a decree should be entered in the above entitled cause adjudging that the temporary restraining order issued in this cause on August 4, 1934 and the restraining order and/or injunction pendente lite thereafter made are valid and that the bonds given therefor should be discharged.

That judgment and a decree should be entered herein adjudging that the restraining order and order to show cause issued on the 21st day of May 1935, by the Honorable Gillies D. Hodge is and at all times was a valid order and said temporary restraining order and order to show cause are made permanent and effective at all times from and after the 21st day of May 1935.

That plaintiffs are entitled to a decree enjoining and re-[fol. 289] straining the defendants John Pelkes and Evelyn H. Treinies and the Sunshine Mining Company from taking any proceedings in courts anywhere with reference to the subject matter of this action or the relief given to the above-named plaintiffs, by the decree of this court, save and except from taking additional proceedings for the protection of their rights in the present action.

That the decree in this action should adjudge that plaintiffs' claims are not barred by laches or any statute of limitations; that plaintiffs are entitled to a decree providing that they have and recover their costs herein incurred and taxed in the sum of \$200.35.

Done this 18th day of August, 1936, at Wallace, Shoshone County, Idaho,

Miles S. Johnson, District Judge.

[fol. 290] There was also included in said exhibit "1" and considered by the court, the decree of the District Court of the First Judicial District of the State of Idaho entered on the 18th of August, 1936, upon receipt of the remittitur from the Supreme Court of the State of Idaho, which decree is as follows:

**DECREE OF DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO**

This cause having come on regularly for trial before the court sitting in equity on the 22nd day of June, 1935, the defendant Treinies appearing by her counsel of record herein, and all of the other parties appearing in person and by their respective counsel of record, said defendant Sunshine Mining Company having appeared at the trial of said cause upon a motion to set aside a default theretofore entered, witnesses having been sworn and oral and documentary evidence having been adduced, the cause having been taken under advisement and the court having heretofore made and entered herein its findings of fact, conclusions of law, and decree, and said cause having heretofore been appealed to the Supreme Court of the State of Idaho, the remittitur in said cause having heretofore come down from the Supreme Court of the State of Idaho, and in the judgment of the latter court the findings of fact, conclusions of law and decree heretofore entered by the court were ordered modified and changed, all of which more fully appears from the records and files in said cause, and the court having heretofore made and entered its findings of fact and conclusions of law herein, now based thereon it hereby makes, renders and enters its judgment and decree as follows:

[fol. 291] It is Hereby Ordered, Adjudged and Decreed and this does order, adjudge and decree that the plaintiff Katherine Mason is the owner of 15,299 shares of the capital stock of the defendant Sunshine Mining Company, represented by certificate numbered WN2849 for 7,600 shares of said stock, and certificate WN615 for 49 shares, and certificate No. WN2868 for 7,600 shares, and certificate No. WN628 for 50 shares, all of which said certificate last above mentioned are on deposit with the clerk of the above-entitled court.

It is Further Ordered, Adjudged and Decreed and this does order and direct the clerk of the above-entitled court to forthwith deliver certificates numbered WN2849 and WN615 for 7,600 and 49 shares respectively of the stock of said corporation to plaintiffs and said clerk is further ordered and directed to forthwith endorse certificate numbered WN2868 for 7,600 shares and certificate numbered Wn628 for fifty shares with the name of the defendant Evelyn H. Treinies, all of said last-mentioned stock to be endorsed to plaintiff Katherine Mason, and said clerk is further ordered and directed to show that said endorsement is made by him as clerk of the above-entitled court and he shall affix thereto the seal of the above-entitled court, and upon making endorsements as hereinabove ordered, the clerk is ordered and directed to deliver the same to the above-named plaintiff Katherine Mason or to her counsel.

It is Further Ordered, Adjudged and Decreed and this does order the defendant Sunshine Mining Company to recognize the assignment of said certificates last above de-[fol. 292] scribed by the clerk of the above-entitled court and upon surrender of said certificates said company is directed and ordered to issue new certificates in lieu thereof to the said Katherine Mason or her order.

It is Further Ordered, Adjudged and Decreed and this does order and direct said defendant Sunshine Mining Company to forthwith pay to the above-named plaintiffs, Katherine Mason and T. R. Mason, all dividends which have been declared on all of said 15,299 shares of stock from and after the 4th day of August, 1934.

It is Further Ordered, Adjudged and Decreed And this does order, adjudge and decree that the above-named plaintiffs, Katherine Mason and T. R. Mason, shall have and recover from the defendants John Pelkes and Evelyn H. Treinies the sum of \$19,429.73 representing the dividends which were paid on said stock to said defendants between the 9th day of August, 1923, and the 4th day of August, 1934, and said plaintiffs are entitled to execution therefor.

It is Further Ordered, Adjudged and Decreed that the temporary restraining order issued in this cause on August 4, 1934, and the restraining order and injunction pendente lite are valid and the bonds given therefor are hereby discharged.

It is Further Ordered, Adjudged and Decreed that the restraining order and order to show cause issued on the

21st day of May, 1935, by the Honorable Gillies D. Hodge is and at all times was a valid order and a permanent restraining order is hereby decreed to said plaintiff T. R. [fol. 293] Mason as against the said Katherine Mason and the said defendants and each and all of them.

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree the plaintiffs a permanent restraining order against the defendants John Pelkes and Evelyn H. Treinies and the defendant Sunshine Mining Company from taking any proceedings in courts anywhere with reference to the subject matter of this action and the relief given to the above-named plaintiffs, save and except from taking additional proceedings for the protection of any rights they may have in this action.

It is Further Ordered, Adjudged and Decreed that plaintiff's claims are not barred by laches or any statute of limitations.

It is Further Ordered, Adjudged and Decreed that the above-named plaintiffs do have and recover their costs herein incurred in this court and hereby taxed in the sum of \$200.35.

Done this 18th day of August 1936, at Wallace, Shoshone County, Idaho.

Miles S. Johnson, District Judge.

[fol. 294] There was also included in said Exhibit No. 1 and considered by the court, an order to show cause and restraining order issued by the District Court of the First Judicial District of the State of Idaho, County of Shoshone, which is as follows:

ORDER TO SHOW CAUSE AND RESTRAINING ORDER

Upon reading the complaint of the above-named plaintiffs on file herein and good cause appearing therefrom to me, and it further appearing therefrom that the plaintiff has a good cause of action against said and each of said defendants and that summons has heretofore been issued in said action.

Now Therefore, it is Hereby Ordered that the said defendants and each of them be and appear before me at my chambers in Wallace, Idaho on the 29th day of August,

1934, at the hour of 2 o'clock P. M. Standard time, of said day, then and there to show cause why they and or each of them and all of them should not be restrained and enjoined during the pendency of this action and until the final determination thereof from disposing or attempting to dispose of, or from selling or attempting to sell any of the shares of the capital stock of the defendant Sunshine Mining Company, a corporation, which is particularly described in plaintiffs' complaint, and why defendant Sunshine Mining Company a corporation, should not be restrained and enjoined during the pendency of this action and until the final determination thereof from transferring said stock or any part and/or portion thereof on the books of said corporation, and from paying any dividends which may accrue on said shares of stock or any sums of money [fol. 295] which said defendant Sunshine Mining Company now owes or may owe prior to the final determination of said action to the said defendants and each and all of them.

And in the meantime, said and each of said defendants are hereby restrained from the commission of any and/or all of said acts and are ordered to desist and refrain from in any way attempting to transfer and/or set over said shares of stock to any person whomsoever.

It is Further Ordered That this order shall become effective upon the plaintiffs' furnishing a bond in the sum of \$1,000.00 according to law, and said bond having been furnished and approved by this court, *to* is ordered that this temporary restraining order shall be immediately effective and observed by said and each of said defendants.

Dated at Wallace, Idaho, this 4th day of August, 1934.

Albert H. Featherstone, District Judge.

[fol. 296] On Sept. 4, 1934, John Pelkes and Evelyn H. Treinies entered their general appearance in the above entitled action filed their demurrer therein and served the same upon counsel for the plaintiffs.

There was also included in said Exhibit "1" and considered by the Court, an Order continuing Restraining Order and injunction, dated August 29, 1934.

ORDER CONTINUING RESTRAINING ORDER, ETC.

The above-entitled court having heretofore made an order to show cause why a certain temporary injunction

heretofore made in the above-entitled cause should not be made permanent, and to appearing from the records and files of the above-entitled cause that the said defendants and each and all of them have been duly and regularly served with summons in said action and that the time for the appearance of the defendant Sunshine Mining Company, a corporation, has heretofore elapsed and that the default of said defendant has heretofore been entered, and the plaintiffs appearing by and through their attorneys of record, Messrs. Lester S. Harrison, Walter H. Hanson and F. C. Keane, and the defendants John Pelkes and Evelyn H. Treinies having failed to in any manner appear and/or plead, and the defendants Frances Thinnies and Pierre Thinnies her husband, by and through their attorney of record in the above-entitled court, to-wit, Mr. Bernard L. Herlihy, having wired the above-entitled court asking for a continuance of the hearing to be had on said order to show cause for a period of two weeks, all of which more fully appears from said wire, a copy of which is hereto [fol. 297] attached, marked Exhibit "A", and by reference made a part hereof in the same manner and to the same extent as though the same were here fully set forth, and the attorneys for the above-named plaintiffs having agreed to said continuance;

Now Therefore, it is Hereby Ordered and this does order that the hearing on said order to show cause be and the same is hereby continued until Wednesday, the 12th day of September, 1934, at the hour of ten o'clock A. M. of said day, Daylight saving Time, nine o'clock A. M. Pacific Standard Time, and that the said defendants Frances Thinnies and Pierre Thinnies, her husband, shall have up to and including said time fixed for said hearing within which to appear and show cause, if any they or either of them have, why said injunction and/or restraining order heretofore made in the above-entitled cause should not be made permanent.

It is Further Ordered and this does order that said restraining order and/or injunction heretofore made in the above-entitled court shall be and the same is hereby continued in full force and effect as against said defendants Frances Thinnies and Pierre Thinnies, her husband, up to and including the determination of said hearing to be had on the 12th day of September, 1934.

It is Further Ordered and this does order that said temporary restraining order and/or injunction heretofore issued as against the defendant Sunshine Mining Company shall be, and the same is hereby effective up to and including the final determination of this action.

[fol. 298] It is Further Ordered that the defendants John Pelkes and Evelyn H. Treinies shall have up to and including the 12th day of September, 1934, within which time to answer said order to show cause heretofore issued in the above-entitled cause, it being further ordered that said temporary restraining order and/or injunction heretofore made in the above-entitled cause be, and the same is hereby continued in full force and effect until said hearing on the 12th day of September, 1934.

Dated this 29th day of August, 1934.

Albert H. Featherstone, District Judge.

[fols. 299-302] There was also included in said Exhibit "1" and considered by the court an order continuing the restraining order made and dated September 12, 1934, filed September 24, 1934, which was as follows:

ORDER CONTINUING RESTRAINING ORDER

The above-entitled matter having been continued by agreement of the parties on the order to show cause until the 12th day of September, 1934, and on said 12th day of September, 1934, the above-named plaintiffs having appeared by and through their attorneys of record, and the defendants and each and all of them having failed to in any manner appear or show cause why the temporary restraining order and/or injunction issued by the court at the time of the institution of said action should not be made permanent, and the court having examined the records and files in the above-entitled cause and being fully advised in the premises;

Now Therefore, it is Hereby Ordered that said restraining order and/or injunction be and the same is hereby continued in full force and effect until the final determination of this action.

Dated this 12th day of September 1934.

Albert H. Featherstone, District Judge.

[fol. 303] There was also included in Exhibit "1" and considered by the court an order continuing the injunction pendente lite, dated March 4th, 1935, filed March 5th 1935 as follows:

ORDER CONTINUING INJUNCTION PENDENTE LITE

This cause come regularly on to be heard before the undersigned, Judge of the Second Judicial District of the state of Idaho, acting in place of the Honorable Albert H. Featherstone, Judge of the First Judicial District of the state of Idaho, disqualified, at Wallace, within Shoshone County, Idaho, on the 11th day of February, 1935, upon the motion of the defendant Evelyn H. Treinies and the motion of the defendants Frances Thinnies and Pierre Thinnies for the dissolution of the injunction pendente lite issues in the above entitled cause on the 12th day of September, 1934, the plaintiffs being represented by their attorneys Walter H. Hanson, Lester S. Harrison and F. C. Keane, the defendant Evelyn H. Treinies by her attorney, H. J. Hull, and the defendants Frances Thinnies and Pierre Thinnies by their attorneys Gray and McNaughton.

The cause was argued to the Court by counsel for the respective parties, and was submitted to the court for its decision, and the Court being fully advised in the premises,
Is Ordered:

1. That the plaintiffs Katherine Mason and T. R. Mason be and they are hereby required to forthwith furnish and file herein an undertaking in the penal sum of Five Thousand Dollars (\$5,000.00), with sufficient securities, conditioned to the effect that the plaintiffs will pay to the defendants such costs, damages and reasonable counsel fees as they may incur or sustain by reason of such injunction pendente lite, if the Court finally decide that the plaintiffs were not entitled thereto, all as required by Section 6-405 of the Idaho Code Annotated, 1932.

2. That if the plaintiffs Katherine Mason and T. R. Mason fail to execute, furnish and file said bond within five days from the date of this order said injunction pendente lite shall forthwith be dissolved and set aside, and each and all of the defendants herein shall be relieved from the restraint of such injunction pendente lite, without further order of this Court.

Dated and done at Moscow, Idaho, this 4th day of March, 1935.

Gillies D. Hodge, Judge of the Second Judicial District of the State of Idaho, Acting in the Place of Hon. Albert H. Featherstone, Judge of the First Judicial District of the State of Idaho, Disqualified.

[fol. 326] EXHIBIT "A" TO AFFIDAVIT OF T. R. MASON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN
AND FOR THE COUNTY OF SPOKANE

In the Matter of the Estate of AMELIA PELKES, Deceased

Petition for Revocation of Letters Testamentary

Comes now Katherine Mason, a resident of Shoshone County, State of Idaho, and respectfully petitions the above entitled Court and shows the following facts:

That the above named decedent, Amelia Pelkes, died testate at Spokane, in the County of Spokane, State of Washington, on the 24th day of April, 1922, that subsequent to the death of said decedent an order was made in the above entitled cause under date of May 1, 1922, admitting the last will and testament of said Amelia Pelkes to probate and appointing one, John Pelkes the husband of said decedent, as the executor of said last will, all of which more fully and at large appears from the file in the above entitled proceeding, reference to which said proceedings is hereby made and the same by reference made a part hereof.

That thereafter and on the 9th day of August, 1923, a decree of distribution of the estate of said decedent was made in the above entitled cause wherein and whereby certain property belonging to said estate was distributed to said above named John Pelkes, the surviving husband of said decedent, and to your petitioner.

That your petitioner was a daughter of said decedent.
[fol. 327] That thereafter no proceedings were ever had or have been had to finally close said estate and that said executor has never received a discharge nor filed any receipts from your petitioner for her distributive share of said estate.

That included among the assets of said estate and which said assets were never inventoried, was the sum of \$10,-024.00 in cash, and that your petitioner never knew that said sum was on hand at the time of the death of the said Amelia Pelkes and that information of such fact has just been brought to your petitioner's attention, and that all of said sum of money as aforesaid was the community property of the said John Pelkes and the said Amelia Pelkes, now deceased.

That in addition to said sum of money aforesaid, the said Amelia Pelkes, now deceased, and the said John Pelkes during their lifetime acquired 30,598 shares of the capital stock of the Sunshine Mining Company, a Washington corporation, and that the said parties also acquired 125,000 shares of the capital stock of the Riverside Copper Mining Company, Ltd., an Idaho corporation, and the additional sum of 100,000 shares of the capital stock of the Teddy Mining and Milling Company, Ltd., an Idaho corporation, and 10,000 shares of the capital stock of the Little North Fork Copper Mining and Milling Company, Ltd., an Idaho corporation.

That none of said property as above mentioned has ever been inventoried nor has probate of said property or any of it ever been had, and that said property as aforesaid and [fol. 328] all of it was an asset belonging to the estate of said Amelia Pelkes, deceased, and subject to probate in the above entitled court and proceeding.

Your petitioner further alleges by reason of the foregoing facts that the said John Pelkes executor of said estate has wasted and-or embezzled all of said property and that he has committed a fraud upon the estate and that he now is incompetent to act. Your petitioner further alleges that the said John Pelkes has permanently removed from the State of Washington and that he now is and has for a number of years last past been a bona fide resident of the City of San Francisco, State of California, residing at what is more commonly known as the Argyle Apartments at 146 McAllister Street of said City of San Francisco; that he has wrongfully neglected the said estate and has neglected to perform his duties as such executor and at the present time he is a very elderly man, being of the age of eighty-four (84) years and upward and is in such state of mind that he requires constant care and attention and for that

additional reason is incompetent to serve further as executor or to in any wise act as such.

That under the terms of said will aforesaid, your petitioner is entitled to have distributed to her an interest in each and all of the property and effects as hereinbefore particularly described and that it is necessary that in order to complete the probate of said estate aforesaid, that some competent person be appointed as the administrator with the will annexed of said estate. Your petitioner, being [fol. 329] a daughter of said decedent and entitled under the terms of said will as aforesaid to share in said estate, hereby nominates C. Harold Easter, a person over the age of twenty-one (21) years and competent in all ways to administer said estate as the administrator with the will annexed of said estate, and that upon the revocation of letters testamentary heretofore issued to the said John Pelkes, your petitioner requests that letters of administration with the will annexed issue to the said C. Harold Easter.

Wherefore, Your petitioner prays that a citation issue to the above named John Pelkes, requiring him to show cause at a time and place to be fixed by the Court, why he should not be removed as the executor of said estate and why letters of administration should not issue to some competent person, and requiring him further to show cause, if any he has why said property as above described, as well as and together with all other property which has at any time come into his hands as such executor, should not be delivered over to the administrator with the will annexed to be appointed by this court, and why said purported decree of distribution heretofore entered in the above entitled court and cause should not be set aside, vacated and held for naught. Petitioner further prays that at said time and place the said decree of distribution by order of this court be set aside, vacated and held for naught; that the appointment of John Pelkes as the executor of said estate be vacated, set aside and held for naught, and that by said order he be required to forthwith deliver over to his successor to be named by this court all of the property hereinbefore [fol. 330] mentioned, and that he be required to fully account to this court and to his successor herein for everything belonging to said estate which he now has or which he ever has had belonging to the estate.

Your petitioner further prays for such other and further relief as to the Court may seem meet, just and equitable.

Katherine Mason, Petitioner. Glen E. Cunningham, Spokane, Washington; Lester S. Harrison, Kellogg, Idaho; Walter H. Hanson, F. C. Keane, Wallace, Idaho, Attorneys for Petitioner.

Duly sworn to by Katherine Mason. Jurat omitted in printing.

EXHIBIT "B" TO AFFIDAVIT OF T. R. MASON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR
SPOKANE COUNTY

No. 15496

In the Matter of the Estate of AMELIA PELKES, Deceased

RETURN TO CITATION

[fol. 331] I. Comes now the respondent, John Pelkes and by way of return to the citation heretofore issued herein demurs thereto for the reason and upon the ground that the matters set out in the petition of Katherine Mason and C. Harold Easter and any right to relief on account thereof are barred by the statutes of limitations of this state.

II. Respondent further by way of return and answer to the allegations set out in the aforesaid petitions, and without waiving the aforesaid demurrer or the grounds thereof, makes the following admissions and denials:

1. In answer to the petition of Katherine Mason for revocation of his letters testamentary, respondent admits the allegations beginning with the words "that the above named decedent, Amelia Pelkes, died testate at Spokane," and ending with the words "or filed any receipt from your petitioner for her distributive share of said estate," and he denies each and every other matter and thing therein contained save as hereinafter expressly admitted.

2. In answer to the petition of C. Harold Easter for letters of administration with the will annexed, respondent admits the allegations thereof beginning with the words "that the above named decedent died testate at Spokane," and

ending with the words "a supplemental inventory was duly filed," and further admits that John Pelkes is the surviving husband of the deceased, and that Katherine Mason is the surviving daughter of the deceased, and denies each and every other matter and thing therein contained save as hereinafter expressly admitted.

III. For a further return respondent shows to the court:

[fol. 332] 1. Some years prior to the death of Amelia Pelkes, which occurred April 24, 1922, respondent had acquired and interest in certain mining properties in the Coeur d'Alene Mining District in Shoshone Count-, Idaho, one of which was known as the "Yankee Girl" group, which was later acquired by the Sunshine Mining Company, and another of which was the Riverside Copper Mining Company, and a third the Teddy Mining Company. After acquiring these interests it became necessary for respondent and his wife, Amelia Pelkes, to remove to Southern Idaho for an indefinite time, during which he desired that some one in the Coeur d'Alenes see that the assessment work was done on the above described properties. At that time and at all times intervening Katherine Mason was and she now is married to Dr. T. R. Mason, and this respondent therefore requested that said Dr. Mason to see that such assessment work was done, and at or about the same time he gave to Dr. Mason and his wife, Katherine Mason, approximately half of his interests in the above described properties. After an absence of approximately a year your respondent and his wife returned to the Coeur d'Alenes. During this absence Dr. Mason had become thoroughly familiar with the properties and the prospects of the Yankee Girl, of the Riverside Copper Mining Company and of the Teddy Mining Company. Shortly after respondent's return arrangements were completed by which the Sunshine Mining Company acquired the property of the Yankee girl Mining Company, and in consideration thereof paid to the stockholders of the Yankee [fol. 333] Girl Mining Company, including Dr. and Mrs. Mason and respondent, certain sums of money, and in addition transferred to them one share of stock of the Sunshine Mining Company for each two and one half shares of stock of the Yankee Girl Mining Company.

2. Thereafter, and on the 24th day of April, 1922. Amelia Pelkes died at the City of Spokane where she and

respondent were then living. At that time and for some years prior thereto, as well as for a number of years subsequent to her death, all of the mining stock referred to in the above described petitions including the stock of the Sunshine Mining Company, was of no value. The Sunshine Mining Company in particular was involved in many difficulties of so serious a nature that it was often extremely difficult for it to carry on its operations. During the administration of the above entitled estate respondent and Katherine Mason entered into an agreement, which will be more fully described hereafter, by which she divested herself of all right, title and interest in or to all of the mining stock referred to in the above described petitions, and by which respondent became the sole and exclusive owner thereof. Some time subsequent to the death of Amelia Pelkes and as respondent believes also subsequent to the settlement between himself and Katherine Mason, Dr. Mason became discouraged with the prospects of the Sunshine Mining Company and therefore sold all of his stock acquired for his interest in the Yankee Girl Mining Company in the manner above described.

3. At all times herein mentioned Katherine Mason and Dr. Mason were residents of the town of Kellogg, Idaho. [fol. 334] The properties of the Yankee Girl and of the Sunshine Mining Company lie in Big Creek Gulch about six miles from the said town of Kellogg. The town is small and its chief occupation is mining. Its citizens are always interested in all mining developments going on about it and a very great percentage are thoroughly familiar with the mining industry in the Coeur d'Alenes, its problems and its successes, and all these matters are constantly discussed in and about the town. Both Katherine Mason and Dr. Mason have always taken an interest in mining ventures, and have been generally familiar with the mining conditions in the territory in and about Kellogg. In the years 1925, and 1926, the Sunshine Mining Company began to operate at a profit. In the year — it paid its first dividend, and thereafter it has paid numerous dividends increasing in amounts, so that it has now paid substantially \$— per share of stock. In the years from 1926, on it has become one of the most profitable mines in the Coeur d'Alenes, and it has been generally known throughout that region, and particularly in Kellogg, that it was an immensely profitable property, and that it was

paying large dividends throughout the years 1926 to the date hereof. At all times since the year 1924 said Sunshine Stock has been one of the most spectacular and most generally discussed stocks in the Coeur d'Alene region and particularly in the said town of Kellogg. The market price of said stock has fluctuated rapidly from a low of approximately 80 cents per share to a high of approximately \$13 per share, all of which was well known to the said Katherine [fol. 335] Mason.

4. Prior to the death of the said Amelia Pelkes and at all times since her death, the said Dr. T. R. Mason has been a large and substantial stockholder in said Teddy and Riverside Mining Companies and during all of said time has been an officer thereof and active in the management thereof and he has at all times recognized the said John Pelkes as the owner of the said stock and has dealt with him as the owner thereof. All of said facts were well known to the said Katherine Mason.

5. With the exceptions hereinafter referred to, the Sunshine Mining Company has always paid respondent all dividends accruing on his stock, including the dividends accruing on the 15,299 shares, referred to by said Katherine Mason as belonging to her in the litigation instituted by her in the state of Idaho, which will be hereinafter referred to in more detail, and for convenience will be hereinafter referred to as the Idaho litigation. The said Katherine Mason knew of the payment of each of these dividends to him and has known as was the fact that he has always believed that each of these payments belonged solely to him and has treated them as belonging to him and that he has established a scale and mode of living in accordance with such belief, and that by reason thereof he has spent substantially all of them in whatsoever manner he has seen fit without considering her or accounting to her, and she has never made any protest or objection of any kind whatsoever to his doing so until on or about the 1st day of August 1934, at which time she instituted the litigation in [fol. 336] Idaho, which is referred to above.

6. By reason of all of the foregoing facts the said Katherine Mason has been guilty of laches and unconscionable delay in the presentation and prosecution of her said claim and petition, and has permitted and suffered the

said John Pelkes to change and alter his position as herein alleged to his great injury and damage, and that any right or claim the petitioner Katherine Mason may or might have had in or to the said stock or any part thereof, or in and to any of the assets or property of the estate of said Amelia Pelkes is now barred by her said laches and delay, and the said Katherine Mason is now estopped from asserting any right, title or claim thereto.

IV. For Respondent's second affirmative answer to the above described petitions, he refers to the allegations contained in his first affirmative answer and by such reference reincorporates them herein and makes them a part hereof, and further alleges:

1. By reason of such facts the matter complained of by each of the several petitioners are barred by the Statutes of limitations of the State of Washington.

V. For respondent's third affirmative answer to the above described petitions, he alleges:

1. Shortly after the death of Amelia Pelkes respondent and Katherine Mason discussed the property of the estate. At that time, to the knowledge of both of them, the mining properties which have been described in the petitions herein, including the stock of the Sunshine Mining Company, was of no value, and both of them were of the [fol. 337] belief that for that reason it need not be included in the inventory, and they then and there discussed this belief with each other, and Katherine Mason knew that none of the mining stocks, including the stock of the Sunshine Mining Company, was included in the inventory and she made no protest thereto, either at that time or later.

2. Respondent included in the inventory all property of the estate, including all cash on hand and no property of any kind whatsoever belonging to the estate was omitted from the inventory save and except the mining stocks above referred to and certain stocks or bonds of the Interstate Utilities Company. Thereafter it occurred to respondent that the stocks or bonds of the Interstate Utilities Company were inadvertently omitted, and he thereupon caused a supplemental inventory to be filed in which they were fully and accurately shown.

3. Thereafter the administration of the property of the above entitled estate proceeded in an orderly manner and respondent in due time and manner filed his final account and petition for distribution, whereupon and order of distribution was entered pursuant to the terms of the will of Amelia Pelkes. After the entry of the said order of distribution respondent discussed a settlement with Katherine Mason of their interests. At that time he voluntarily offered to give her an additional interest in the estate over and above the amount that she was entitled to by the will and by the said order of distribution. At that time and at the specific instance and request of the said Katherine Mason he also agreed to pay her her share in cash or by [fol. 338] transferring to her certain choses in action from which money could be readily realized, and at her specific instance and request he retained all of the mining stocks above referred to together with certain real estate that both she and he anticipated would be difficult to dispose of, and thereafter respondent fully performed all the terms of this settlement.

4. Respondent has fully and justly accounted for all the assets of the estate coming into his possession. He has paid all of the debts and obligations of the estate, including all sums due the State of Washington as inheritance taxes or for any other reason whatsoever, and has paid over to the said Katherine Mason sums much larger than she was entitled to either under the will of the said Amelia Pelkes or the decree of distribution. However, respondent is ignorant of the law and did not know that it was necessary for him to take a receipt from Katherine Mason for the amount which she had received. He did not know that it was necessary for him to be discharged and released from further liability as executor herein. He believed at that time, and continued to believe until recently advised by counsel, that the estate had been completely administered on and had been closed so soon as he had paid all the debts thereof and had made distribution of the estate according to the order of distribution entered by this court. Respondent is now desirous that the said Katherine Mason be required to file herein her receipt for the portion of the estate of Amelia Pelkes which she has heretofore received, and is also desirous that an order be entered releasing him and [fol. 339] discharging him from all liability in connection

herewith, and from further obligation to act as executor herein.

VI. Further answering, and not only by way of affirmative answer but as a cross petition upon which respondent seeks affirmative relief, he alleges

1. Respondent and Amelia Pelkes were, during the lifetime of the said Amelia, citizens of the State of Washington, residing in the City and County of Spokane, in said State and were possessed of sundry property, real and personal, owned by them in community right. The greater portion of such property was situated in Spokane County, Washington. On or about April 24, 1922, the said Amelia died testate in Spokane County, Washington, leaving a last will and testament by which she gave devised and bequeathed unto her husband, the respondent herein, and to her daughter, Katherine Mason, the petitioner herein, all her property, real personal and mixed, wheresoever situated, share and share alike, and to have and hold the same in equal shares. By the said will she nominated and appointed her husband, respondent herein executor of such will and further ordered and directed that no bond or other security should be required of him, and that he execute the will and distribute the estate as provided in the will without any application to any court for leave or confirmation and without the intervention of any court, unless the same should be expressly required by law.

2. On or about April 27, 1922, respondent petitioned this court for the probate of the will of the said Amelia Pelkes and for his appointment as executor of said will in accordance with its terms, and thereafter, upon May 1, 1922, respondent was by order of this court, duly entered in the proceedings for the probate of the will, appointed executor of the said will, in accordance with the terms thereof. Such proceedings were duly had and taken that an inventory of the property of the estate was filed, and adjudication of solvency was made, and thereafter on August 9, 1923, a decree of final distribution was made whereby the property of the estate was distributed to and vested in respondent and in Katherine Mason, the daughter of the said Amelia Pelkes. It was provided in such decree of distribution that "By this decree the said John Pelkes becomes the owner of an undivided three fourths interest

in the property described in the inventories on file herein or the proceeds thereof, and the said Katherine Mason becomes the owner of the remaining one-fourth interest, undivided, in said property, the said John Pelkes being the owner of a community or undivided one-half interest of said property at the time of the death of his wife, the said Amelia Pelkes." No further actions or proceedings were had or taken in such estate proceeding, save that there was a voluntary settlement and distribution of the property of the estate agreed upon between respondent and the said Katherine Mason, the terms of which are as follows: After the entry of the Order of distribution respondent discussed with Katherine Mason a settlement of their interests. He then voluntarily offered her an additional interest in the property of the estate over and above the amount that she was entitled to by the will and by the order of distribution. [fol. 341] She accepted his offer and it was also agreed that he would give her the share to which she was entitled under the agreement in the transfer of certain choses in action of the estate from which money could be readily realized. Thereupon he delivered the agreed choses, which she accepted as the full share that was due her under the terms of said agreement. At her specific instance and request, and in accordance with the terms of the agreement made, he retained all of the mining stocks belonging to the estate and certain real estate that it was anticipated would be difficult to realize on. Such agreement for settlement and distribution was the only agreement with respect to the property of the estate which was entered into between respondent and Katherine Mason and such agreement was as alleged herein and not as falsely alleged in the complaint in the Idaho Action.

3. The proceedings for the probating of the will of the said Amelia Pelkes and all proceedings taken therein appear upon the files and records of this court in the proceedings entitled "In the matter of the Estate of Amelia Pelkes, deceased," No. 15496, and respondent prays reference to such files and records for all necessary purposes in connection with this cross-petition.

4. Early in August, 1934, the said Katherine Mason and her husband, T. R. Mason, began an action in the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone against respondent,

joining with him as co-defendant Frances Thinnes and Pierre Thinnes, her husband, Evelyn H. Treinies and Sunshine Mining Company a corporation. For a cause of action upon which the relief sought was prayed the plaintiffs in said action alleged as facts the following matters: That they were and now are husband and wife, and the Sunshine Mining Company has been and is a corporation organized and existing under and by virtue of the laws of the State of Washington, but had complied with the laws of the state of Idaho relating to foreign corporations doing business within such State, and it was and at all times in the complaint mentioned has been subject to the jurisdiction of the courts of the State of Idaho; that during her lifetime Amelia Pelkes was the wife of the respondent herein, and that on April 24, 1922, Amelia Pelkes died, being at that time a resident of Spokane, Spokane County, Washington, and that she left surviving her as her sole heirs at law the respondent and the plaintiff Katherine Mason, the latter being a daughter of the said Amelia Pelkes; that on May 25, 1920, respondent and Amelia Pelkes became the owners of certificate No. 111 for 30,598 shares of the capital stock of the defendant Sunshine Mining Company, and that said stock was the community property of respondent and Amelia Pelkes; that probate proceedings were begun in the Superior Court of Spokane County, State of Washington, which was the place of the domicile of Amelia Pelkes at the time of her death, and the will was duly probated in said court; that thereafter a settlement was had between respondent and the plaintiff Katherine Mason, and that under the terms of such settlement each of the parties became the owner of a one half interest in and to said [fol. 343] 30,598 shares of Sunshine Mining Company stock; that by such agreement it was also agreed that respondent would hold title to Katherine Mason's one half interest in such stock and that respondent would secure a division of such stock so as to give to Katherine Mason her one half interest in the stock upon demand, if and when the shares of such stock should be of any value, and that respondent further agreed to account and pay to Katherine Mason any dividends which might be paid on such stock; that at the time such agreement was entered into the shares aforesaid were of practically no value, save and except a prospective value; that thereafter the stock became valuable and the

Sunshine Mining Company paid a considerable sum in dividends thereon, and that after it had become valuable respondent on divers occasions promised Katherine Mason that he would hold the stock until it became more valuable and would make her a considerable sum of money out of the stock, and that at the proper time he would turn said shares of capital stock, together with all accrued dividends, over to her, and that relying upon such promises Katherine Mason has permitted respondent to retain the possession and legal title to her 15,299 shares of the stock; that on or about October 27, 1931, respondent, acting wrongfully and unlawfully and in violation of his trust, and with intent to defraud Katherine Mason, conveyed 12,000 shares of the total 30,598 shares of the capital stock of the Sunshine Mining Company, standing in his name to the defendant Pierre Thinnes, the said Pierre knowing of the trust for Katherine Mason upon which respondent held the shares [fol. 344] of sunshine stock; that Pierre Thinnes afterwards caused the stock transferred to him to be transferred to the defendant Frances Thinnes, she also having knowledge of the trust; that on or about November 13, 1933, respondent caused 16,000 shares of the said 30,598 shares of Sunshine Mining Company stock to be transferred to the defendant Evelyn H. Treinies, said transfer being made by respondent with the fraudulent intent and purpose of defrauding Katherine Mason of her interest in such stock, and with the knowledge on her part of the trust agreement under which respondent held the stock; that the Sunshine Mining Company has paid large sums in dividends upon the stock so held by respondent and by the other defendants in the Idaho action, being an amount in excess of \$3 on each and every share of the stock. Those allegations were followed by general allegations that the stock standing in the names of Thinnes and Treinies would be transferred to innocent purchasers if they knew of the commencement of this action, and that the Sunshine Mining Company would permit the transfer of such shares, and that therefore plaintiffs had no plain, speedy or adequate remedy at law, and for that reason invoked the equitable jurisdiction of the Court. Upon the matters so alleged the plaintiffs prayed a decree of the Idaho Court ordering, adjudging and decreeing Katherine Mason to be the owner of 15,299 shares of the capital stock of the Sunshine Mining Company, and that the respondent held said shares of stock in trust for her;

for a further decree that the transfer of the shares of stock by the respondent to the defendants Thinnies and Treinies was fraudulent and without consideration and setting aside such transfers; that the defendants should be [fol. 345] enjoined from transferring the stock or entering any transfer on the books of the defendant Mining Company and for a decree of the Court enjoining the payment of any dividends upon the shares of stock in controversy. Against the defendant Sunshine Mining Company a decree was prayed cancelling the certificates of stock now standing in the names of defendants Thinnies and Treinies, and that the Company be directed to issue to the plaintiffs a certificate in lieu thereof for 15,299 shares of the capital stock.

5. Of the defendants in the Idaho action, the defendant Sunshine Mining Company has defaulted and a judgment by default was entered against it. The other defendants named in said action have severally appeared therein and are severally defending the action, denying the matters set up as cause of action therein, and Katherine Mason is vigorously prosecuting said action in the aforesaid District Court of Idaho for Shoshone County.

6. The said Katherine Mason has filed in this proceeding in the Matter of the Estate of Amelia Pelkes Deceased, No. 15,496, a petition for revocation of letters testamentary issued to respondent, and by such petition is seeking the removal of respondent as executor of such estate, the appointment of an administrator d. b. n. c. t. a. to succeed the respondent's duties in respect to the administration of the estate of Amelia Pelkes, and an order requiring respondent to account to his successor for certain property which it is alleged respondent has embezzled or wasted. As cause for the granting of the relief sought she has [fol. 346] alleged as facts that respondent did not inventory or account for sundry assets of the estate of Amelia Pelkes, included in which was the sum of \$10,024, 30,598 shares of the capital stock of the Sunshine Mining Company, a Washington corporation, 125,000 shares of the capital stock of the Riverside Copper mining Company Ltd., an Idaho corporation, 100,000 shares of the capital stock of the Teddy Mining and Milling Company Ltd., an Idaho corporation, and 10,000 shares of the capital stock of the Little North Fork Copper Mining and Milling Company, Ltd. an Idaho Corporation. Of the property so mentioned,

it is untrue that \$10,024, or any other sum of the assets of the estate of Amelia Pelkes, was not accounted for or wasted or embezzled by respondent, but that on the contrary every penny of the money of the estate of Amelia Pelkes was fully accounted for and distributed according to the agreement between respondent and Katherine Mason. Of the mining stock described, none of it was included in the inventory of the property of the estate of Amelia Pelkes for the reason that at the time of the Probate proceedings none of said stock was considered to be of any value, and none of it has ever been or is now of any value, except the stock of the Sunshine Mining Company which became and was understood to be of value not earlier than the year 1924. The omission of such stock from the inventory of the property of the estate and the reason therefor was well known to and acquiesced in by Katherine Mason at all times during the taking of the proceedings heretofore alleged as occurring in the matter of such estate. Since [fol. 347] the entry of the decree of final distribution in the estate proceedings the 30,598 shares of the stock of the Sunshine Mining Company has become of great value, and it is that stock alone which Katherine Mason is seeking to recover in the Idaho action and by the proceedings taken herein. The allegations concerning the embezzlement of the \$10,024, and concerning the remaining shares of stock were inserted in her pleadings solely to humiliate, harass and annoy respondent, and the stock of the Sunshine Mining Company constitutes the sole subject matter of the present litigation, not only in the Idaho Court but in this proceeding.

7. Through inadvertence and mistake no receipts showing a distribution of the property of the estate of Amelia Pelkes were ever taken and no order finally discharging respondent as the executor of said estate was ever made, respondent is informed that because no receipt was taken or order of discharge made the probate proceeding still is pending in this court. By virtue thereof, this court is the court of primary jurisdiction in all matters connected with the estate of Amelia Pelkes and the distribution of property under either the terms of her will or an agreement for distribution voluntarily entered into between the distributees. The shares of stock of the Sunshine Mining Company, the subject matter of the Idaho litigation, are

the sole incentive for Katherine Mason's petition in this proceeding, and the only property of the estate of Amelia Pelkes which is in controversy between respondent and Katherine Mason. Respondent alleges that so far as con-[fol. 348] cerns that stock, there has been an agreement of settlement which has been fully performed and by which Katherine Mason has received all that is her due. If respondent shall not be able to establish the settlement pleaded then he must account to her for the stock in accordance with the will of Amelia Pelkes. In any event is he amenable to the process of this court and to such order as it may make in the matter of the estate of Amelia Pelkes, deceased, not only for the stock of the Sunshine Mining Company, which is the actual bone of contention, but also for any other property of the estate for which he may not have accounted. The action in Idaho is a proceeding in rem directed solely at the Sunshine Mining Company stock. Katherine Mason is vigorously pressing such action and will endeavor to force it to trial at the earliest possible moment. In the event that she succeeds in such action, and is granted the relief therein prayed, the Sunshine Mining Company stock will by order of the Idaho Court be taken from respondent and transferred as may be directed by the Idaho court, whereby respondent will be unable to comply with any order which this court may make respecting the said stock.

VII. Further answering and not only by way of affirmative answer but as his second cross-petition upon which respondent seeks affirmative relief, he alleges:

1. At the time of the death of Amelia Pelkes respondent was a resident of Spokane County, and, although he has traveled a great deal in the intervening years he has always been and now is a resident of this county. He is now 82 years of age, and, although he is ordinarily very vigorous [fol. 349] for a man of his years, he is subject to attacks of rheumatism and gout, during which he is unable even to care for his most personal needs, and these attacks are sometimes protracted for months. Very frequently they affect the joints of his wrists and produce a pain so excruciating that it is impossible for him to raise his hands. Because of this condition he is absolutely bedfast and needs constant assistance and attention during the progress of

these attacks. It is urgent that he spend as much of his time as possible in southern climates, particularly in the winter, since the climate in and around Spokane ordinarily produces renewals of these attacks of great intensity. All these facts are well known to Katherine Mason.

2. Respondent has always been a man of great family loyalty, and since his wife's death he has been accustomed from time to time to make very large gifts of money and loans to the members of his family, and he has been most liberal in the gifts and loans to Katherine Mason and her husband, as a result thereof he has entirely divested himself of all means of livelihood save the stock in the Sunshine Mining Company above referred to, and a building in Kellogg worth approximately the sum of \$2,500 which the said Dr. Mason conveyed to him as security for a loan in excess of \$8,000. All of these facts are also well known to Katherine Mason.

3. During the last 18 months the Sunshine Mining Company has been particularly successful and has largely increased the dividends it had been paying. During the year 1934 it paid as dividends a sum in excess of \$1,000,000 all [fol. 350] of which came from its earnings in that year. Katherine Mason knowing all of the foregoing facts and induced by the great prosperity of the Sunshine Mining Company in August, 1934, instituted the Idaho litigation against your respondent, and in December, 1934, filed her petition herein, not in good faith or in the belief either that she had entered into a settlement in this estate by which respondent held 15,299 shares, or any other number of shares, of the Sunshine Mining Company stock in trust for her, or that he had embezzled 30,598 of such shares, or any other number, but because she knew as was the fact, that such stock constituted his last substantial means of subsistence, and because she knew how great his needs were during his recurrent illnesses, and because she believed that he induced thereby and by the desire for peace and quiet in his old age could be forced to make a settlement of her claims. For that reason she has made both the Idaho litigation and these proceedings as troublesome to respondent as possible. She has procured an injunction and restraining order in the Idaho litigation by which the Sunshine Mining Company has been prevented from paying respondent any portion of the dividends that have accrued

upon his stock since the date of the institution of that action. At the time of procuring this injunction she well knew, as was the fact, that the value of the 15,299 shares of Sunshine Mining Company stock which she then conceded was the property of respondent was worth much more than the \$45,000 which she contended he had received as dividends upon the stock which she claimed to own, but she nevertheless [fol. 351] procured this injunction for the purpose of divesting respondent of any income in order that he might be thereby induced to consent to a settlement of her claims. She moreover has based the two proceedings on entirely separate and inconsistent causes of action, with the intent and purpose that respondent should be subjected to as heavy a burden of defense as possible. In this estate she has charged that the said 30,598 shares of Sunshine Mining Company stock was embezzled by respondent from this estate. In the Idaho litigation she has charged that in a settlement between them of their interest herein a trust agreement was entered into by which she became the equitable owner of one-half of the Sunshine Mining Company stock, and that respondent became charged with dividends paid thereon. Should respondent succeed in that action it would not prevent the further prosecution of these proceedings based on the charge of embezzlement, and should he succeed here and prove that there had been no embezzlement from the estate, it would not prevent the further prosecution of that action. The said Katherine Mason has thus pleaded in these two proceedings in order that the determination of one would not be a bar to the other, all for the purpose of harrassing and burdening respondent. Moreover, she is causing the Idaho litigation to be pressed forward as rapidly as possible, and at the same time she instituted these proceedings herein and pressed them, so that it is necessary for respondent to employ counsel in both jurisdictions and to prepare himself for trial in both, all of which is a great burden to a man of his years, as the said Katherine Mason [fol. 352] intended it should be. All this has been done, not in a belief in justice for her various claims against him, but for the purpose of harrassing and burdening respondent so that he would be compelled to settle. Respondent therefore is entitled to have injunction entered herein restraining the said Katherine Mason from further proceedings in the said Idaho litigation pending the final determination of this pro-

ceeding, and is further entitled upon the termination hereof to have such temporary injunction made permanent.

Wherefore, respondent prays that a temporary restraining order may be entered herein restraining Katherine Mason from further prosecution of the action in the Idaho Court, and that such temporary restraining order shall be made permanent upon the conclusion of this litigation. Respondent further prays that it be adjudged that respondent has fully accounted for all the property of the estate of Amelia Pelkes, and that he has paid and turned over to Katherine Mason all the property of such estate to which she was entitled, either by the terms of the will of Amelia Pelkes or by the voluntary settlement entered into between her and respondent. Also respondent prays that a decree shall be entered herein finally winding up the affairs of the estate of Amelia Pelkes and discharging respondent as executor of such estate, and that he recover his costs from the petitioners.

H. J. Hull, Graves, Kizer & Graves, Attorneys for
Respondent.

(Verification.)

[fol. 353] To this return Katherine Mason interposes a demurrer and a motion to strike directed at the major portion of the return. Her position was that John Pelkes "• • • is not interested in the outcome of any litigation now pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and that the same is immaterial, redundant and constitutes no defense to petitioner's petition herein filed save and except as to the mining stock other than the Sunshine" for the reason that he had transferred the stock to Evelyn H. Treinies and was no longer its owner. The position was also taken by Katherine Mason that the Superior Court sitting in probate was not clothed with jurisdiction in the estate to hear and determine the facts involved in the Idaho litigation and also that it did not have the power to enjoin and restrain the prosecution of the Idaho action.

An argument of these matters was had before the Honorable Fred H. Witt. He is and was a duly qualified and acting Judge of the Superior Court of the State of Washington for Spokane County. He filed his written opinion in the cause, in which he stated:

"• • • it is competent and relevant to show that prior to and during all the probate proceedings, Katherine Mason knew all about the Sunshine stock; knew it was not inventoried and the reason therefor; and that Katherine [fol. 354] Mason with full knowledge of the assets of the estate entered into an agreement settling all of their property rights under the will • • •."

"I am of the opinion that the litigation now pending in the Idaho courts is of the utmost importance in this proceeding. • • • The return to the citation has set up these facts concerning the Idaho action and assuming their truth, the Superior Court of Washington, having full and complete jurisdiction of the estate and the parties, should insist that the charges made by the petitioner against the executor in this proceeding be first investigated and determined before she can further prosecute the Idaho suit. • • •."

"The demurrer is overruled; the motion to strike being addressed to material and evidentiary facts alike and raising practically the same issues as the demurrer, it is denied."

Upon the filing of this opinion John Pelkes immediately moved in the presiding department of the Superior Court of Washington for Spokane County for a temporary restraining order, restraining prosecution of the Idaho action, and for a show cause order requiring Katherine Mason to submit herself for examination or oral interrogatories. Both motions were granted in orders signed by the Honorable William A. Huenke, on the 4th day of March 1934. After the entry of these orders Katherine Mason and T. R. Mason separately applied to the Supreme Court of the State of Washington for writs of prohibition addressed to the Honorable Fred H. Witt and Honorable William A. Huneke, as Judges of the Superior Court of the State of Washington for Spokane County, and to all other members of that court. In those applications they each set out as exhibits the complaint filed by them in the Idaho litigation; the petitions of Katherine Mason and C. Harold Easter in the probate proceedings in Washington; the return of John Pelkes to the citation issued thereon; the opinion of Judge Witt above referred to; the temporary restraining [fol. 355] order and the show cause order, dated March 4th, and stated with reference thereto (we quote from the petitioner of Katherine Mason):

“ * * * your petitioner caused said answer to citation to be attacked on the ground and for the reason that said answer to citation did not state facts sufficient to constitute a defense and also moved to strike a great portion of said answer to citation and objected to the jurisdiction of the Superior Court of the State of Washington for Spokane County, to entertain jurisdiction of the matters and issues which the said John Pelkes attempted to have said court take cognizance of * * * .”

They then called the Court's attention to their averments in the complaint filed in the action in Idaho in which they alleged “that a settlement of all of the assets belonging to the said estate was had between * * * John Pelkes and * * * Katherine Mason, and that under the terms thereof each became the owner of a one half interest in and to the said 30,598 shares, “and after that reference proceeded to attack the jurisdiction of the Superior Court of Washington for Spokane County, Alleging;

"That the said Superior Court of the State of Washington, in and for the county of Spokane, is now and at all times has been without jurisdiction and without any authority to hear and/or try and or determine the rights of this petitioner, and the said John Pelkes, arising out of said contract as hereinbefore alleged, and that said court is without jurisdiction in said estate proceeding to make any order of any kind, nature and/or description which would in anywise be binding upon the prosecution of the action in any other forum, and that said court was at all times herein mentioned and now is without jurisdiction to make any valid restraining order, either temporary or an injunction pendente lite, which in any manner affects the procedure [fol. 356] of this petitioner in said Idaho action."

"That said Superior Court of the State of Washington, in and for the County of Spokane, has no authority whatsoever to attempt a hearing and/or trial of the rights of your petitioner and the said John Pelkes in that certain action now pending in said Superior Court and which action is entitled No. 15,496, in the Matter of the Estate of Amelia Pelkes, deceased."

With reference to the show cause order, it was alleged:

"* * * that said Superior Court is without jurisdiction to make any order requiring your said petitioner to appear at any time other than the time of trial in said estate proceeding in said Superior Court * * *"

"That this applicant and/or petitioner has no speedy and/or adequate remedy by appeal or otherwise * * * for the reason that said Superior Court of the State of Washington, in and for the County of Spokane, is wholly without jurisdiction to hear and/or determine the said cause as it now is attempting to assume and/or exercise said jurisdiction."

and concluded with this prayer:

"That this court issue its writ of prohibition commanding said Superior Court and Further commanding the said Honorable William A. Huneke and the Honorable Fred H. Witt to desist from any proceedings in said action, and from exercising any power over the restraining order heretofore issued or any other writs or orders issued in said cause."

The Honorable Fred H. Witt filed a return to this application in which he there stated the position taken by counsel for Katherine Mason in the argument before him:

4. " * * * that all the probate court could or should do in this proceeding was to remove John Pelkes as executor and appoint an administrator in his place and that there- [fol. 357] after such substituted administrator should proceed in a separate action brought against John Pelkes for an accounting and that therefore the affirmative matters plead by John Pelkes constituted neither a defense to the petition of Katherine Mason nor constituted any basis for the affirmative relief he prayed for."

Katherine Mason and T. R. Mason filed a joint brief in the Supreme Court of Washington in support of their application for writs of prohibition in which they set out the following specifications of error:

"I. The defendant, the Honorable Fred H. Witt, exceeded the jurisdiction of the Superior Court * * * in making and entering in the matter of the estate of Amelia Pelkes his written opinion therein.

"II. The defendant, the Honorable Wm. A. Huneke exceeded the jurisdiction of the Honorable Superior Court * * * in making and entering a temporary restraining order together with an order to show cause, which is particularly set forth in petitioners' petitions, for the reason that said Superior Court was without jurisdiction to try and/or determine any of the matters and/or things in relation to said action pending in the District Court * * * of the State of Idaho * * *."

"III. That the Honorable Superior Court * * * exceeded its jurisdiction in attempting to restrain a further prosecution of said action in Idaho * * * for the reason that any judgment and/or decree made by said Superior Court * * * in said estate proceedings would not be res judicata as to the commencement and/or prosecution of another action by the heirs of said estate in another forum * * *."

"V. That the Honorable Superior Court * * * exceeded its jurisdiction in attempting to enjoin and/or restrain the said petitioner, Katherine Mason, from the prose-

[fol. 358] cution of said action pending within the State of Idaho, for the reason that the said petitioner Katherine Mason, had never subjected herself and has never been subject to the jurisdiction of the Superior Court * * * and said restraining order * * * was served upon said petitioner Katherine Mason within the state of Idaho and outside of the jurisdiction of said Superior Court, as aforesaid."

That brief stated their position as follows:

"* * * the superior court sitting in Probate for the purpose of handling all matters in connection with the Probate of the estate of Amelia Pelkes, deceased, was wholly and is wholly devoid of jurisdiction to determine a matter which has arisen solely and only between John Pelkes, the executor of said estate, acting in his personal capacity, as distinguished from his representative capacity, and Katherine Mason, acting in her capacity as an individual and not in her capacity as an heir to the estate of said Amelia Pelkes."

They further contended that:

"* * * the Superior Court in the matter of the estate of Amelia Pelkes, deceased, did not have authority to go into or determine what agreement was made between Katherine Mason on the one hand and John Pelkes on the other with reference to a division after a decree of distribution had been entered of the property in the estate of the said Amelia Pelkes."

The applications were submitted to the Supreme Court of Washington on oral argument and written brief, and were denied. Thereupon remittitur issued from that Court to the Superior Court of the State of Washington for Spokane County, each of which stated:

"This cause having been heretofore submitted to the Court on the application of the petitioner for a writ of [fols. 359-393] prohibition commanding said Superior Court of Spokane County to desist from any further proceedings in its cause No. 15,496 * * * and from exercising any power over the restraining order heretofore issued, and the court having fully considered the same and denied the application for the writ of prohibition, it is now ordered

that the writ be denied and that the said John Pelkes have and recover * * * the costs of this action * * *. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith * * *."

[fol. 394] The motion for the restraining order was dated the 21st day of May and filed on the 22nd day of May.

There was also included in Exhibit "1" and considered by the court, an order to show cause and temporary restraining order issued by the District Judge which was in words and figures as follows:

ORDER TO SHOW CAUSE AND RESTRAINING ORDER

Upon reading the affidavit of T. R. Mason on file herein and good cause appearing therefrom to me and it further appearing therefrom and from the records and filed in the above entitled cause that the plaintiffs in said cause have a good cause of action against said defendants, and each of said defendants, and that summons has heretofore been issued in said action and that the said defendants and each and all of them, save and except the Sunshine Mining Company a corporation, have appeared in said action and have filed their verified answers,

Now Therefore, it is Hereby Ordered That the defendants, John Pelkes and Evelyn H. Treinies together with their agents and/or attorneys to-wit: Wm. B. Hornblower, H. J. Hull, Graves, Kizer and Graves, and Will Graves and Paul Graves, and the plaintiff Katherine Mason together with her agents and/or attorneys, to-wit: Lester S. Harrison Walter H. Hanson and F. C. Keane, and Glenn E. Cunningham and Richard S. Munter, be and appear before me at Chambers in the above entitled Court in Wallace, Shoshone County, State of Idaho, on the 5th day of June, A. D. 1935, at the hour of 10 o'clock A. M. of said day, then and [fol. 395] there to show cause why they, the said defendants John Pelkes and Evelyn H. Treinies, together with their agents and/or attorneys, to-wit: Wm. B. Hornblower, H. J. Hull, Graves, Kizer and Graves, and Will Graves and Paul Graves, and the plaintiffs Katherine Mason, together with her agents and/or attorneys to-wit: Lester S. Harrison, Walter H. Hanson and F. C. Keane, and Glenn E. Cunningham and Richard S. Munter, and each of them should not be

restrained and enjoined during the pendency of this action and until the final determination thereof, or until further order of the court, from attempting to further prosecute or do anything in connection with a matter now pending in the Superior Court of the State of Washington in and for the County of Spokane, entitled, "In the Matter of the Estate of Amelia Pelkes, Deceased".

And in the meantime, the said defendants John Pelkes and Evelyn H. Treinies, together with their agents and/or attorneys, to-wit: Wm. B. Hornblower, H. J. Hull, Graves, Kizer and Graves and Will Graves and Paul Graves, and the plaintiff Katherine Mason together with her agents and/or attorneys, to-wit: Lester S. Harrison, Walter H. Hanson and F. C. Keane, and Glenn E. Cunningham and Richard S. Munter, are ordered to desist and refrain from taking any further proceeding in said cause now pending in said Superior Court of the State of Washington in and for the county of Spokane, until the further order of this Court.

It is Further Ordered: that this order shall become effective upon the plaintiff T. R. Mason furnishing bond in the sum of \$500.00 according to law, and said bond having been furnished and approved by this court,

It is Ordered that this temporary restraining order shall be immediately effective and observed by the said defendants, John Pelkes and Evelyn H. Treinies together with their agents and/or attorneys to-wit: Wm. B. Hornblower, H. J. Hull, Graves, Kizer and Graves, and Will Graves and Paul Graves, and the plaintiff Katherine Mason together with her agents and/or attorneys, to-wit: Lester S. Harrison, Walter H. Hanson and F. C. Keane, and Glenn E. Cunningham and Richard S. Munter.

Dated at Moscow, Idaho, this 21st day of May A. D. 1935.
Gillies D. Hodge, District Judge.

Return of service on the order to show cause and restraining order was made by the Sheriff of Shoshone County, Idaho, which was as follows:

RETURN ON ORDER TO SHOW CAUSE AND RESTRAINING ORDER
Sheriff's Office, County of Shoshone, State of Idaho, ss:

I, Fred C. May, Sheriff of the County of Shoshone, State of Idaho, do hereby certify and return that I received the within and hereunto annexed Order to show cause and re-

straining Order on the 22nd day of May, A. D. 1935, and personally served the same upon H. J. Hull, Walter H. Hanson, F. C. Keane and Lester S. Harrison, by delivering [fols. 397-430] to and leaving with the said H. J. Hull, personally and on the 22nd day of May A. D. 1935, in the County of Shoshone, State of Idaho, a copy of said Order to show Cause and Restraining Order, together with copies of the affidavit of T. R. Mason, and Praecipe. And I further certify and return that service was made upon the said Walter H. Hanson, F. C. Keane and Lester S. Harrison, on the 22nd day of May A. D. 1935, by delivering to and leaving with said Walter H. Hanson, F. C. Keane and Lester S. Harrison, personally, in the County of Shoshone, State of Idaho, a copy of said Order to show cause and Restraining Order.

Dated this 1st day of June, A. D. 1935.

Fred C. May, Sheriff, by Dennis Goggin, Deputy.

[fol. 431] By an order dated the 21st of Nov. 1935, the Clerk of the Court was appointed official custodian of the stock, which said order was as follows:

**ORDER APPOINTING CLERK AS OFFICIAL CUSTODIAN OF STOCK
IN ACCORDANCE WITH STATUTE RELATING TO STAY AND
SUPERSEDEAS OF JUDGMENTS**

The oral application of the Sunshine Mining company coming on for hearing before the Honorable Miles S. Johnson in his chambers at Lewiston, Idaho, at 4:00 o'clock p. m., on this 4th day of November, 1935, the said Sunshine Mining Company appearing by its attorneys of record herein, the said application being made for an order designating and appointing the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, as the officer who should be the custodian of Certificate No. WN 2868 evidencing 7600 shares of capital stock of the Sunshine Mining Company, Certificate No. WN 2869 evidencing 700 shares of capital stock of the Sunshine Mining Company, Certificate No. WN 628 evidencing 50 shares of capital stock of the Sunshine Mining Company, and Certificate No. WN 629 evidencing one (1) share of Capital stock of said Sunshine Mining Company, all of said certificates being issued and

standing in the name of Evelyn H. Treinies, and all of said stock being issued by said Sunshine Mining Company in conformity with the decree and judgment in the above entitled court and cause made on the 28th day of September, [fol. 432] 1935, entered on the 30th day of September, 1935, and it appearing to the satisfaction of said Judge that the Sunshine Mining Company has perfected its appeal from said judgment and decree to the Supreme Court of the State of Idaho, and is entitled to stay the enforcement of said judgment and decree by compliance with the statutes of the State of Idaho relating to stay and supersedeas judgments. And it further appearing to said Judge that the provisions of Section 11-205 and/or 11-206 Idaho Code Annotated govern the matter of supersedeas and deposit, and, in conformity therewith, the Sunshine Mining Company has heretofore legally deposited with said Clerk Certificate No. WN2849 for 7600 shares and Certificate No. WN615 for 49 shares, respectively, of the capital stock of the Sunshine Mining Company in the name of Katherine Mason to stay the enforcement of said Judgment insofar as it awards said stock to Katherine Mason. And it further appearing that defendants, John Pelkes and Evelyn H. Treinies, have heretofore, perfected their appeal from said Judgment hereinbefore mentioned, entered in the above entitled court and cause, to the Supreme Court of the State of Idaho. And it further appearing that said John Pelkes and Evelyn H. Treinies have failed to comply with said judgment and decree in that they, and each of them, have failed to surrender or deliver for cancellation Certificate No. 1755-A evidencing 16,000 shares of stock in the Sunshine Mining Company, issued and standing in the name of Evelyn H. Treinies. And it further appearing [fol. 433] that the Sunshine Mining Company is a disinterested party as to the ownership of all of said stock involved in the above entitled action, and is not a owner of or claimant to any of said stock mentioned in said judgment and decree and should not be imperiled or prejudiced by the adverse claims of the plaintiffs and the defendants, John Pelkes and Evelyn H. Treinies.

Now, Therefore, It Is Hereby Ordered that the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, be and he is hereby designated to act as receiver and official cus-

todian of following certificates of stock issued by the Sunshine Mining Company, to-wit: Certificate No. W N 2849 for 7600 shares issued in the name of Katherine Mason, Certificate No. WN 615 issued in the name of Katherine Mason for 49 shares, Certificate No. WN 2868 for 7600 shares issued in the name of Evelyn H. Treinies, Certificate No. WN 2869 for 700 shares issued in the name of Evelyn H. Treinies, Certificate No. WN 628 for 50 shares issued in the name of Evelyn H. Treinies, Certificate No. WN 629 for one (1) share issued in the name of Evelyn H. Treinies.

It Is Ordered, Adjudged and Decreed that the Clerk be and he is hereby ordered to hold said stock above described as required by this order and/or in the manner provided in Section 11-205 of the Idaho Code Annotated, and subject to the further orders of the court.

It Is Further Ordered, Adjudged and Decreed that all [fols. 434-442] dividends heretofore accrued and unpaid and hereinafter accruing on any or all of said stock subsequent to this date be retained by the said Sunshine Mining Company for the benefit of any individual or individuals ultimately adjudged to be the owner thereof and pending a final settlement of the above entitled cause.

It is Further Ordered, Adjudged and Decreed that upon the deposit of the said shares of stock as hereinabove provided the judgment herein be stayed as to the Sunshine Mining Company alone pending appeal, and that the judgment be not stayed as to defendants, John Pelkes and Evelyn H. Treinies.

It is Further Ordered, Adjudged and Decreed that this order shall not be construed as modifying, changing or altering the judgment and decree of the court heretofore entered in this cause in any respect whatsoever, the sole purpose of the order being to stay the said judgment pending appeal as to the said Sunshine Mining Company alone.

Done this 21st day of November, 1935.

Miles S. Johnson, District Judge.

[fol. 443] IN SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

JOHN PELKES and EVELYN H. TREINIES, Plaintiffs,

VS.

KATHERINE MASON, T. R. MASON, LESTER S. HARRISON, WALTER H. HANSON, F. C. Keane, Richard S. Munter, and Sunshine Mining Company, Defendants

ORDER GRANTING LEAVE TO FILE AN ORIGINAL BILL IN THE
NATURE OF A SUPPLEMENTAL BILL

This cause came on to be heard on plaintiffs' motion for leave to file an original bill in the nature of a supplemental bill; the court having considered of the motion and the complaint presented therewith, and being fully advised of the files, orders and judgments in cause No. 15,496 or the [fol. 444] files of this court entitled "In the Matter of the Estate of Amelia Pelkes, Deceased," and it appearing that cause is shown for the granting of the motion,

It is Ordered that plaintiffs be and they hereby are granted permission to file the complaint herewith entitled as above as an original bill in the nature of a supplemental bill for the purpose of giving effect to a judgment of this court rendered in case No. 15,496 entitled "In the Matter of the Estate of Amelia Pelkes, Deceased," on May 31, 1935. Notice to the resident defendants of the filing of such original bill in the nature of a supplemental bill, and that they are required to appear and plead thereto, shall be given by service upon them in the usual manner of the usual twenty (20) days' summons. Notice to the non-resident defendants shall be given by the service upon them of the usual sixty (60) days' summons served by personal service outside of the state, and also of a citation requiring them to appear and plead to the bill within sixty (60) days after the service upon them of such citation.

Dated October 18th, 1935.

William A. Huneke, Judge.

[fol. 445] IN SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

JOHN PELKES and EVELYN H. TREINIES, Plaintiffs,

vs.

KATHERINE MASON, T. R. MASON, LESTER S. HARRISON, WALTER H. HANSON, F. C. Keane, Richard S. Munter, and Sunshine Mining Company, Defendants

COMPLAINT

Complaining of defendants, plaintiffs show unto the Court:

1. During the year 1922 and prior thereto John and Amelia Pelkes were husband and wife. April 24, 1922, Amelia Pelkes died testate. The community composed of John and Amelia Pelkes owned property, the greater part of which was situated in Spokane County, Washington. They resided in that county and State prior to Amelia's death and Amelia died there.

2. May 1, 1922, the will of Amelia Pelkes was probated in this court. John Pelkes, who was nominated as executor in the will, was appointed as executor thereof and jurisdiction over the will and its administration was assumed by this court. The sole beneficiaries under the will were John Pelkes, husband and Katherine Mason, daughter of the testatrix. To them she left all her property, share and share alike. She was possessed of no separate property.

3. An original and a supplemental inventory of the property of the estate which purported to describe all the property of the estate, were filed in due course and the property described was appraised. However, not all the property of the community was inventoried or appraised. The community owned a great many shares of mining stock, included in which were 30,598 shares of the stock of the Sunshine Mining Company. All of those shares were deemed worthless, and by mutual consent of the sole beneficiaries, Pelkes and Mason, none of the mining shares were inventoried, appraised or specifically mentioned until the proceedings taken in the estate during the years 1934 and 1935 hereinafter stated.

4. The administration of the estate of Amelia Pelkes proceeded in orderly course to a final report and accounting of the executor and a decree of distribution which was rendered on August 9, 1923. All those proceedings occurred, the decree was rendered, and everything hereinafter referred to as things done and proceedings taken in the matter of the estate of Amelia Pelkes were taken and had in this court in the cause entitled "In the Matter of the Estate of Amelia Pelkes, Deceased," being cause No. 15,496 of the files of this Court. Plaintiffs pray reference to the files and orders in that cause in respect to all matters germane to this proceeding, and they request the court to take notice of its files and orders in that cause for all the purposes of this proceeding.

5. The decree of distribution rendered in the above cause ordered the property affected by the will of Amelia Pelkes to be distributed to the beneficiaries named in the will, to-wit: John Pelkes, husband and Katherine Mason, daughter, in equal and undivided shares and by the will and the decree of distribution John Pelkes became the owner of an undivided three-fourths interest in all the property distributed, [fol. 447] he being the owner of an undivided one-half interest thereof, which he owned as his community share, and the one-fourth interest conveyed by the will, and Katherine Mason became the owner of the remaining one-fourth of the entire estate administered by virtue of the provisions of her mother's will. Immediately after the rendition of the decree of distribution and before any further steps were taken in the cause, John Pelkes and Katherine Mason reached an agreement by which Katherine Mason was given certain specific property in lieu of the undivided interest in all the property of the estate to which she was entitled under the will and decree of distribution, and John Pelkes took the remainder as his share of the community estate, and that to which he was entitled under the will and decree of distribution. The division agreed on was made and each party thereto took and enjoyed the property taken under the agreement. However, no receipt was given for the property taken by either party, nothing was filed in Court relating to the division, the courts approval of such division was not obtained, and no order discharging Pelkes as executor was made or asked for, all of which more fully appears from the findings and judgment rendered in the afore-

said cause, which are hereinafter referred to and attached as an exhibit to this complaint.

6. Nothing further was done in the matter of the estate of Amelia Pelkes until, to-wit, December 19, 1934, when Katherine Mason filed in the cause entitled and numbered as before stated a petition for revocation of letters testamentary issued to John Pelkes, for his removal as executor, and for the appointment of an administrator with the will [fol. 448] annexed to complete the administration of the estate. She presented therewith a petition of one C. Harold Easter for appointment as administrator C.t.a. and she joined in his petition for such appointment, assuming to nominate him as an heir and a beneficiary under the will of Amelia Pelkes. John Pelkes was cited to appear and show cause why the prayer of these petitions should not be granted. He appeared, filed a cross-petition, and litigation ensued in this court and in the Supreme Court of the state concerning his removal and concerning the affirmative relief against Katherine Mason to which by his cross-petition and by an original petition filed by him he claimed to be entitled. This litigation culminated in findings and a judgment made and rendered by this court. These findings set out fully the proceedings in the estate of Amelia Pelkes leading up to the judgment, and reference is prayed thereto. For convenience plaintiffs attach a copy of the findings and judgment rendered by this court, which is marked exhibit "A" and is prayed to be read as a part hereof.

7. Upon, to-wit, August 4, 1934, and while the administration of the estate of Amelia Pelkes was pending in this court, Katherine Mason and T. R. Mason, her husband, who claimed an interest in the subject matter of the action under the community laws of the State of Idaho, commenced an action in the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone against John Pelkes, Frances Thinnes and Pierre [fol. 449] Thinnes, her husband, Evelyn H. Treinies and the Sunshine Mining Company. That action purported to be in rem and to secure an interest in 30,598 shares of capital stock of the Sunshine Mining Company to which Katherine Mason claimed to be entitled by virtue of a settlement made with John Pelkes after the probating of the will of Amelia Pelkes. Such steps were thereafter taken

in that action that the defendant- Thinnes were dismissed out of the case, and that upon September 28, 1935, a decree was rendered against the remaining defendants in the case which provided (omitting formal portions) as follows:

"This cause came on for trial before the court sitting in equity on June 22, 1935, defendant Treinies appearing by her counsel of record herein, the other individual parties appearing personally and by their respective counsel of record herein, and defendant Sunshine Mining Company having appeared generally upon a motion to set aside default, and witnesses having been sworn, and oral and documentary evidence introduced, and the cause having been taken under advisement, and the Court having made and entered its Findings of Fact and Conclusions of Law, now based thereon, makes, renders and enters its judgment and decree as follows:

"It is Ordered, Considered, Adjudged and Decreed That plaintiff Katherine Mason, is the owner of seven thousand six hundred forty-nine (7,649) shares of the capital stock [fol. 450] of the Sunshine Mining Company, evidenced by certificate No. 1755-A of the stock of said company standing of record in the name of the defendant, Evelyn H. Treinies and the plaintiffs are the owners of dividends accrued and accruing thereon since August 4th, 1934.

"It is Further Ordered, Considered, Adjudged and Decreed, that defendant, Evelyn H. Treinies be and she is hereby ordered directed and required within (10) ten days from the filing of this decree to endorse and deliver to the Sunshine Mining Company the said certificate of stock No. 1755-A and upon receipt of the said certificate the Sunshine Mining Company is ordered, directed and required to cancel the same of record and in lieu thereof to issue and deliver to Katherine Mason a certificate for seven thousand six hundred forty-nine (7649- shares of said capital stock and to pay to plaintiffs the dividends accrued and accruing since August 4th, 1934; and to issue and deliver to defendants Evelyn H. Treinies or her assigns a certificate of capital stock for the residue of the stock evidenced by the said certificate No. 1755-A and to pay to defendant Treinies or her assigns, the dividends thereon accrued or accruing since August 4th, 1934.

"It is Further Ordered, Considered, Adjudged and Decreed, that if defendant, Evelyn H. Treinies, shall fail to en-

[fol. 451] dorse and surrender the said certificate of stock No. 1755-A within ten (10) days after the filing of this decree then defendant, Sunshine Mining Company, shall cancel the said certificate of stock of record and shall issue and deliver a certificate for seven thousand six hundred forty nine (7649) shares of capital stock of the Sunshine Mining Company to Katherine Mason, and pay to plaintiffs the dividends accrued or accruing thereon since August 4, 1934, and defendant Sunshine Mining Company, shall issue and deliver a certificate of stock to Evelyn H. Treinies, or her assigns for the residue of the stock evidenced by said certificate No. 1755-A and shall pay to the said Evelyn H. Treinies, or her assigns the dividends accrued and accruing thereon since August 4, 1934, upon the endorsement and surrender of the said certificate No. 1755-A.

"It is Further Ordered, Considered, Adjudged and Decreed, that defendants, Evelyn H. Treinies and John Pelkes and Sunshine Mining Company, their attorneys, agents, employees and persons acting in their aid or assistance, be and they are hereby permanently enjoined from transferring the said certificate No. 1755-A or disposing of the same or of any of the stock evidenced thereby otherwise than as required by this decree; and the defendant, Sunshine Mining Company be and it is hereby enjoined from paying to the defendant Evelyn H. Treinies or her assigns, any dividends upon the said stock until the said defendant, Evelyn H. Treinies shall have complied with this decree.

"It is Further Ordered, Considered, Adjudged and Decreed, that the plaintiffs' claims are not barred by laches or by any statute of limitations.

"It is Further Ordered, Considered, Adjudged and Decreed, that the temporary restraining order issued in this cause on the application of plaintiffs on August 4th, 1934, and the injunction and/or restraining order pendente lite thereafter issued upon plaintiff's application be and they are adjudged to be valid, and that the bonds given for the procurement of the said orders or injunctions be and they are hereby discharged.

"It is Further Considered, Ordered, Adjudged and Decreed, that defendants and each of them be and they are hereby restrained and enjoined from commencing or taking any further proceedings in the Courts of Washington, in the matter of the estate of Amelia Pelkes, deceased, or in any

court with reference to the subject matter of this action, or with reference to the relief given to the parties by this decree; and defendants and each of them, are permanently enjoined and restrained from taking any such proceedings, [fol. 453] saving only by appeal or application to the Supreme Court of Idaho.

"It is Further Considered, Ordered, Adjudged and Decreed, that plaintiffs recover their costs taxed and allowed in the sum of \$—. Done this 28th day of September 1935".

This decree was rendered *ex parte*. No notice was given defendants of the time when and place where it would be signed. They were not informed of its contents and no opportunity was afforded them to be heard respecting its provisions. The decree is void because there was no prayer for the relief which was granted, there were no allegations in any pleading to sustain its provisions, and it is in all respects in excess of the issues framed by the pleadings. It is inoperative as to the shares of stock attempted to be disposed of. In contemplation of law those shares were in the possession of this court until May 31, 1935, when the administration of the estate of Amelia Pelkes was closed and the executor was discharged. The defendants Pelkes and Treinies, during the entire time that the Idaho action was pending, were, and they now are, non-residents of Idaho. The certificate for the shares (#1755-A during that time has been in the possession of the defendant Treinies, it has not been and is not now within the State of Idaho, and the shares stand in her name upon the registry of shares and transfer books kept by the defendant Sunshine Mining Company in the State of Washington. Furthermore, the defendant Pelkes and Treinies, answering in the Idaho action in February 1935, pleaded the pending proceedings in this court in the matter of the estate of Amelia Pelkes deceased (no. [fol. 454] 15496 aforesaid). Later, as soon as the aforesaid findings and decree of this court (exhibit "A") were made and rendered, they filed amended answers in which the findings and decree were pleaded as a final binding and conclusive determination and adjudication of all matters and issues presented and involved in the Idaho action, and demanded that full faith and credit be given to judgment as required by the provisions of Sec. 1 Article IV of the Constitution of the United States. When the Idaho action was called for trial, they demanded that there be first tried and

determined the question of the making and rendering of the said findings and decree (exhibit "A"). Their demand was refused. In the progress of the trial, they were permitted to prove, subject to the opinion of the trial court as to its relevancy and competency, the proceedings in this court in No. 15,496, and the making and rendition by this court of the findings and decree aforesaid (Exhibit "A"). That court, in rendering its decision, found that this court had no jurisdiction over the parties nor the subject matter, and that all its findings, orders and decrees subsequent to the filing of the petition of Katherine Mason therein save only so much as discharged the executor, are and were without jurisdiction, null and void. Acting upon this finding, it rendered the decree above set out. The defendants Pelkes and Treinies (plaintiffs here) are prosecuting an appeal from that decree to the Supreme Court of the State of Idaho, and have endeavored to obtain an order of supersedeas pending the appeal. A statute of the State of Idaho relating to supersedeas provides:

[fol. 455] "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order can not be stayed by appeal unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court or judge thereof may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

1 Idaho Codes Annotated, Sec. 11-205.

The Idaho trial court has ruled that they cannot supersede the decree unless they deposit with an officer or receiver appointed by it 15,299 shares of the stock of the Sunshine Mining Company and all the dividends which have accrued upon that number of shares since the beginning of the Idaho Action on August 4, 1934, a sum of between \$15,000 and \$18,000, or unless they give an undertaking conditioned as required by the above section in the sum of \$150,000. Plaintiffs are without appreciable resources save the shares of stock in litigation and the accrued dividends, and it is impossible for them to give a supersedeas bond in the sum of \$150,000 or any other amount running into the thousands.

The Idaho court intends to and will appoint an Idaho Bank or the Clerk of that court as officer or receiver to hold the [fol. 456] shares and accrued dividends pending the appeal if plaintiffs consent to supersede by depositing the shares and dividends. Because plaintiffs' prime contention is that the shares and dividends have never been within the jurisdiction of the Idaho Court, they cannot consent to the transfer of the shares and dividends to that jurisdiction. Moreover, the order is unreasonable and arbitrary in that while the decree adjudged Katherine Mason to be the owner of 7,649 shares and accrued dividends, the supersedeas order that will be made (as announced) requires 15,299 shares and accrued dividends to be deposited. Plaintiffs are informed and believe and on such information and belief allege the fact to be, that if the Idaho decree is not superseded, and if the defendants here are not restrained from enforcing it, the stock and dividends ordered to be delivered to Katherine Mason will be delivered to her. On further information and belief plaintiffs allege the fact to be that Katherine Mason is insolvent, or that a judgment or order for the recovery of any substantial sum of money from her or her husband, T. R. Mason, cannot be enforced, and they allege that if she or they obtain possession of the shares and dividends the property will be dissipated before a final decision can be rendered, and that plaintiffs will thereby be rendered remediless although the decree appealed from be reversed.

8. Evelyn H. Treinies is the owner of 16,000 shares of the capital stock of defendant Sunshine Mining Company. Those shares stand in her name upon the stock registry and transfer books of the company, and she holds a regular [fol. 457] stock certificate, #1755A issued by the company evidencing her ownership of the shares. When the Idaho action was begun the Sunshine Mining Company was made a party thereto and was enjoined from transferring any of those shares or paying any dividends thereon. Accrued dividends on those shares, amounting to \$15,000 to \$18,000 are in the hands of the company. That company is a corporation organized and existing under the laws of the State of Washington. It owns a mine within the State of Idaho which it is working and its principal source of income is from the operation of that mine. It is entitled to do business in Idaho under the laws of that state relating to foreign corporations. It has no office or place of business in that

state, except such as is necessary for the operation of the mine which it owns therein. It has no other business in Idaho than the mine and no officers in that state except such as are engaged in the direction of operations in the mine. Its principal office and place of business is in the State of Washington. Its corporate books and records, including its books and records for the registration and transfer of shares of stock are kept in the state of Washington. Plaintiffs are informed that it also has a branch transfer office in the State of New York. However that fact may be, its corporate office is in the State of Washington and no corporate records are kept in the state of Idaho, and no stock transfers can be made in that state. When the Idaho action heretofore referred to was begun service of process was made upon a resident officer of the Sunshine Mining Company. [fol. 458] It neglected to appear in the action and default was taken against it. Later the Sunshine Mining Company attempted to have the default taken against it set aside by the Idaho Court, but its application to that end was denied. From the time of its rendition the company was informed of the judgment rendered by this court (exhibit "A") adjudging that the shares of stock of the Sunshine Mining Company in litigation were the property of John Pelkes, and its attorney were present during the trial of the Idaho action and heard the claim made by the defendants Pelkes and Treinies that the judgment of this court was a bar to the Idaho action. Nevertheless, the Sunshine Mining Company professes that it is amenable to the process of the Idaho Court, and that it will be compelled to deliver the stock and accrued dividends to Katherine Mason as provided in the decree of the Idaho Court heretofore set out. It refuses to recognize the judgment of this court vesting title to the shares of stock in John Pelkes, the plaintiffs have reason to believe and do believe that the defendant Company will deliver the shares and accrued dividends as provided by the decree if plaintiffs do not supersede the decree on the terms and in the manner indicated by the trial court, or unless it is stayed from so doing by the order of this court.

9. The defendants Harrison, Hanson and Keane are members of the bar of the State of Idaho, but are not members of the bar of this state. The defendants Masons, Hanson and Keane reside in the State of Idaho. The defend-

[fol. 459] ants Harrison and Munter reside in the State of Washington. Harrison, Hanson and Keane brought the Idaho action above referred to as attorneys for the Masons, the plaintiffs therein. When Katherine Mason filed her petition for the removal of John Pelkes as executor in cause No. 15,496 aforesaid, they appeared as attorneys for her and for her nominee for administrator c. t. a., those of them who were not members of the bar of this state being permitted to appear as attorneys for her in such manner by an order of this court. Later the defendant Munter was joined as counsel for Katherine Mason in the proceedings initiated by her petition which culminated in the findings and judgment appearing as exhibit "A" hereto, and the four defendants Harrison, Hanson, Keane and Munter were attorneys for Katherine Mason in the proceedings and trial which resulted in such findings and judgment. When rulings adverse to their contentions were made in the course of such proceedings and trial, they endeavored to withdraw their client and the proceedings initiated by her and them from the jurisdiction of this court. Failing that, they pressed the Idaho action to trial. In that action, the plaintiffs herein, Pelkes and Treinies, pleaded in bar the proceedings in the matter of the estate of Amelia Pelkes, especially the findings and judgment appearing as Exhibit "A" hereto. The defendants herein (other than the Sunshine Mining Company) insisted that this Court was without jurisdiction to render the judgment, and by their insistence procured the Idaho Court to render the decree set out in the preceding paragraph. [fol. 460] All of the defendants (other than the Sunshine Mining Company) are colluding and acting together to defeat and render fruitless the judgment of this court (exhibit "A" aforesaid). They are pressing enforcement of the Idaho decree and are endeavoring to compel the defendant Sunshine Mining Company to deliver to Katherine Mason the shares of stock of that company and the amount of the dividends accrued thereon. Each and all of them are acting in that behalf, and the defendant attorneys are vehement, and sometimes virulent, in their denial of the jurisdiction of this court to take any action whatsoever in cause No. 15,496 after the filing of Katherine Mason's petition therein.

10. Of the 30,598 shares of stock in the Sunshine Mining Company, which were property of the estate of Amelia Pelkes at the time her will was probated, 12,000 shares were

conveyed by John Pelkes to his nephew, the Pierre Thinnies who was joined as defendant in the Idaho action and later dismissed out of that action. In the year 1933, John Pelkes, being then 81 or 82 years of age, conveyed 16,000 shares of the stock to his co-plaintiff Evelyn H. Treinies, who is a niece of his deceased wife, in consideration of an agreement on her part to maintain and take care of him for the remainder of his days. The remaining shares of stock of the Sunshine Mining Company were disposed of by Pelkes at different times during the period from 1922 to the present day. The 16,000 shares conveyed to Evelyn H. Treinies are the shares which were in litigation in the Idaho action and [fol. 461] are the only shares affected by this action. Those shares are evidenced by a share certificate issued to Evelyn H. Treinies and in her possession. Neither the certificate nor the shares have ever been within the state of Idaho, or within the jurisdiction of the Idaho court rendering the decree here in question.

Wherefore, plaintiffs *pary* :

1. That the defendants (other than the Sunshine Mining Company) be enjoined and perpetually restrained from asserting or claiming in any manner any right, title or interest in or to the shares of stock of the Sunshine Mining Company described in and apparently affected by the decree of the Idaho court hereinbefore set out, or any other right, title or interest therein or thereto derived from or through Katherine Mason and originating prior to May 31, 1935.

2. That the same defendants be enjoined and perpetually restrained from applying for obtaining using, or instituting any process, proceeding, suit or action for the purpose of enforcing the aforesaid decree of the Idaho court or any of its provisions.

3. That the same defendants be enjoined and perpetually restrained from endeavoring in any manner or through any process, proceeding, suit or action to compel the defendant Sunshine Mining Company to comply with the terms of the aforesaid decree, or any of them, and from attempting by threats or otherwise to dissuade the Sunshine Mining Company from, or influencing it against, recognizing plaintiffs' [fol. 462] rights in the shares of stock in litigation as they

have been or may be established by the judgment of this court.

4. That the Sunshine Mining Company be enjoined and perpetually restrained from delivering any of the shares of stock in litigation, or any dividends accrued or to accrue, to the defendants herein, or any of them, and that it be required to recognize the plaintiffs herein as the sole and only owners of such shares and dividends in accordance with the judgment of this court heretofore rendered and to be rendered herein.

5. That an injunction pendente lite issue restraining defendants, and each of them, from the actions, steps and proceedings hereinbefore referred to; that a mandatory injunction pendente lite also issue requiring the defendant Sunshine Mining Company forthwith to pay to plaintiff Evelyn H. Treinies the dividends accrued on all the shares standing in her name which are not affected by the Idaho decree, and to recognize her as the owner of all such shares and entitled to have them transferred on its books upon compliance with its usual rules.

6. That in the event the defendant Sunshine Mining Company has surrendered and paid, or shall surrender and pay, any of the shares and accrued dividends to Katherine Mason, or under pretense of compulsion from the Idaho decree or otherwise shall bring such shares and dividends within the jurisdiction of the Idaho Court, that then plaintiffs (as their interest may appear) shall be given a money judgment against it for the value of such shares and dividends, [fols. 463-466] or for such other damages as may fully compensate plaintiffs.

7. That the court shall make such other order, judgment or decree as may be necessary or proper in order to enforce its judgment heretofore rendered, and to protect plaintiffs' title to the stock in litigation and accrued dividends. That it shall grant all such further relief as may be meet and equitable, and award plaintiffs their costs.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

(Subscribed and sworn to by Evelyn H. Treinies,
before T. A. Dunn, Notary Public in and for the
State of Washington, residing at Spokane.)
(Seal.)

Exhibit "A" is a copy of the findings and order approving partition and correcting receipts for distributive shares and discharging executor, dated May 31, 1935 in the Superior Court of the State of Washington for Spokane County, in the matter of the estate of Amelia Pelkes, deceased, which has been heretofore referred to and which is printed in full as part of exhibit "E" in defendants' exhibit 22, in the instant case, a transcript of record in the Supreme Court of the United States on petition of John Pelkes and Evelyn H. Treinies for writ of certiorari to the Supreme Court of Idaho.

[fol. 467]

EXHIBIT No. 7

AMENDED COMPLAINT

The said exhibit "7" above referred to consisted of authenticated copies of the pleadings entitled; "Seattle First National Bank, (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, Deceased and Evelyn H. Treinies, Plaintiffs, vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane, and Sunshine Mining Company, defendants", said files so exemplified consisting of an amended complaint, demurrer of Sunshine Mining Company, Order appointing Receiver and Order transferring trail to Yakima County, said cause being No. 39,435 pending in the Superior Court of the State of Washington for Yakima County.

The Amended Complaint filed January 19, 1937 of the plaintiffs therein alleged that John Pelkes died testate in the City of Spokane on the 15th day of October 1936, and his will was admitted to probate, and that the Seattle-First National Bank, being qualified to act, was appointed and qualified as administrator with the will annexed for his estate.

Omitting the formal allegations as to the other defendants, said amended complaint sets out in paragraphs III, IV, V, VI, and VII the proceedings in the estate of Amelia Pelkes, deceased, as referred to in this statement, and it is further shown by exhibits 11, 12 and 13, in this proceeding and referred to later in this statement.

In Paragraph VIII of said amended complaint, it was alleged that John Pelkes transferred 16,000 shares of stock to Evelyn H. Treinies, which shares were represented by certificate No. 1755-A, and that neither the certificate or the shares have ever been within the State of Idaho or within the jurisdiction of the Idaho Court rendering the decree.

[fol. 468] In paragraph 9, the plaintiffs allege that the stock had become valuable and the defendants Walter H. Hanson and Lester S. Harrison, attorneys practicing in Idaho, entered into a contract with Katherine Mason and T. R. Mason by which it was agreed that they would institute such proceedings as seemed desirable for obtaining certain shares of stock, and that Hanson and Harrison would conduct such proceedings at their own expense, and would receive between fifty and seventy-five per cent of the value of all stock and dividends so obtained, and that the proceedings herein mentioned have been conducted by said Hanson and Harrison pursuant to that understanding.

That said amended Complaint further sets out in paragraphs 10 and 11 that an action was commenced by Katherine Mason and T. R. Mason on August 4, 1934, in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, the files of which are referred to in this statement as Exhibit "1" and pleads the decree entered in that action.

The plaintiffs further plead in their amended complaint in paragraph 11, that the decree of the District Court of Idaho and the Supreme Court of Idaho were both inoperative as to the said stock, and in contemplation of law, the shares of stock in question were in possession of the Superior Court of the State of Washington during the entire time the administration of the estate of Amelia Pelkes was pending, and that the certificate referred to was not and is not in the State of Idaho, and the shares stand in the Registry of Shares and Transfer Books kept by the defendant Sunshine Mining Company in the State of Washington.

It was further alleged that in the action in the District Court of Shoshone County, Idaho, the said John Pelkes and Evelyn H. Treinies pleaded the proceedings pending in the Court in the matter of the Estate of Amelia [fol. 469] Pelkes, deceased, being the decree of the Su-

perior Court of the State of Washington for Spokane County; the decree of said court being marked Exhibit "A" and attached to the Amended Complaint and referred to.

It was alleged that the said Pelkes and Treinies filed answers in the said action in Idaho pleading the laws of the State of Washington, and demanded that full faith and credit be given the judgment of the Superior Court of the State of Washington for Spokane County, as required by the provisions of Section 1, Article IV of the Constitution of the United States; that the Constitution and Statutory provisions of the State of Washington were admitted in the pleadings in Idaho, and that the parties were permitted to prove in the Idaho action the proceedings of the Superior Court of the State of Washington, in said Cause No. 15,496, and the making and rendition of the findings and decree in the matter of the Estate of Amelia Pelkes, deceased, but that the District Court and Supreme Court in Idaho found that the Superior Court of the State of Washington had no jurisdiction over the subject matter nor the parties and that all its findings, orders and decrees subsequent to the filing of the petition of Katherine Mason therein, save only so much of the discharge of the executor are and were without jurisdiction, null and void.

The plaintiffs further alleged that the Supreme Court of Idaho had remitted the cause to the District Court of of Shoshone County, Idaho, with instruction to enter a judgment in favor of the plaintiffs in that action and to award to the plaintiffs 15,299 shares of stock which they claimed, together with dividends and that the defendant Sunshine Mining Company had issued certificates for 15,299 shares of said stock and deposited same with the Clerk of the District Court of Shoshone County, Idaho.

Plaintiffs further alleged in paragraph 11 that the defendants Hanson and Harrison were involved in litigation and that they were insolvent and that said Katherine [fol. 470] Mason and T. R. Mason were insolvent, and that if they were permitted to receive the certificates of stock, the same would be sold and dissipated and that none of the defendants could respond in damages.

Plaintiffs further alleged in paragraph 13, that the Sunshine Mining Company has no office or place of business in Idaho except in connection with the operation of the mine which it owns therein; that its principal office and place of

business is in the State of Washington; that its corporate books and records, including its books and records of the registration and transfer of shares of stock, are in the state of Washington; that no corporate records are kept in the State of Idaho, and no stock transfers can be made in that state; that Sunshine Mining Company has refused to recognize the judgments of the Superior Court of the State of Washington vesting title to the shares of stock in John Pelkes.

The plaintiffs further alleged in paragraph 14 that the defendants Mason and wife, Lester S. Harrison, Walter H. Hanson and F. C. Keane had caused incompetency proceedings to be instituted against John Pelkes in the Courts of the State of California and that in said incompetency proceedings in California, the validity of the agreement between John Pelkes and Evelyn H. Treinies was challenged upon the ground that John Pelkes was at the time incompetent, and that the purpose of this was to secure a decree of incompetency so that John Pelkes could not execute a will, and that under the laws of the State of California, where John Pelkes then resided, the defendant Katherine Mason would be his sole heir.

Plaintiffs further allege in Paragraph 15 of the amended complaint that the defendants other than the Sunshine Mining Company, have instituted against the plaintiffs, either separately or collectively, certain proceedings, to-wit:

[fol. 471] The petition of Katherine Mason for the removal of John Pelkes as executor of the estate of Amelia Pelkes, deceased.

The action in Idaho which has been referred to.

A proceeding in Cobb County, California, in 1934 alleging the incompetency of John Pelkes and seeking the appointment of a guardian of his person and property.

Two Prohibition proceedings instituted in the Supreme Court of the State of Washington to prohibit the Superior Court of Spokane County from continuing with the litigation it was invited to adjudicate upon the petition of Katherine Mason.

A second incompetency proceeding instituted in the county of San Francisco, California, in 1935, for the appointment of a guardian to take control of the person and

property of John Pelkes, and an appeal to the Supreme Court from the Court of California therein.

Plaintiffs further allege in paragraph 16, that defendants asserted in the Idaho litigation and elsewhere that the decree entered by the Superior Court of the State of Washington was of no effect or validity and that they would not pay any heed to its terms.

Defendants allege in Paragraph 17 that the defendants Harrison, Hanson and Keane filed, at the time of filing the petition of Katherine Mason for the removal of John Pelkes as executor, their prayer for permission to appear in their client's behalf in that proceeding, and promised they would conduct the litigation so instituted through to completion. Notwithstanding that fact, however, they have refused to perform any of the acts directed by the Court [fol. 472] in that proceeding but have contumaciously and actively flouted the jurisdiction of the court, and that when it was necessary for the defendants Harrison, Hanson and Keane to proceed across any portion of the State of Washington, they have resorted to the use of airplanes to avoid the process of this Court, except on occasions when defendant Keane has come into the State and has solicited from counsel for plaintiffs a promise that he would not be served with process issued out of the court.

It was further alleged that the defendants Katherine Mason and T. R. Mason have kept outside the State ever since the entry of the decree referred to and that notwithstanding the Court has personal jurisdiction of the defendants, it has been impossible to bring them before the court to obtain compliance with its orders, and that compliance therewith can only be obtained by its impounding and sequestering any property within the State of Washington in which they have or claim some right, title or interest.

The plaintiffs further allege that the defendants Sunshine Mining Company although knowing of the decree as referred to, has purported to cancel certificate No. 1755-A issued to Evelyn H. Treinies, and has posted notices thereof in stock exchanges.

Plaintiffs further allege that by reason of the facts set out, the plaintiff's title to her undivided interest in the assets of the Sunshine Mining Company represented by certificates No. 1755-A has become clouded; that this has re-

sulted both from the issuance of certificates of stock by the Sunshine Mining Company purporting to cover the same undivided interest and by the further fact that there are reports of an attorney's lien on such certificate in favor of Lester S. Harrison and Walter H. Hanson.

The plaintiffs prayed that the undivided interest in the [fol. 473] assets of the Sunshine Mining Company, represented by the conflicting stock certificates above referred to, be sequestered and impounded and that a receiver be appointed to retain such interest in his possession as the officer of this Court pendente lite, and that upon completion of this litigation, he be permitted to deliver such interest to the plaintiff Evelyn H. Treinies.

The plaintiffs further prayed that defendants named in the complaint have no right, title or interest in the certificates heretofore issued either to Katherine Mason or to Evelyn H. Treinies or to John Pelkes, or to any undivided interest in the assets of Sunshine Mining Company represented thereby, and that the title of the plaintiff Evelyn H. Treinies in and to said certificate of stock be quieted and freed from any cloud cast thereon by any of the decrees of the Courts of Idaho or by the issuance of any certificates to Katherine Mason or anyone claiming through her, and that the interest of the defendants and any person claiming through them, if there is found to be such interest, be sold by the Receiver of the Court and the proceeds paid to the plaintiff Evelyn H. Treinies, or in the event the Plaintiff is deprived of her interest, that she may have a money judgment against any of the defendants who may have so deprived her thereof, for such damages as she may have sustained.

The plaintiffs further prayed that the defendants other than the Sunshine Mining Company, be enjoined and perpetually restrained from asserting or claiming any right, title or interest in the shares of stock of the Sunshine Mining Company involved in the litigation, the same defendants being enjoined and perpetually restrained from obtaining, using or instituting any process, proceeding, suit or action for the purpose of enforcing the decrees of the Idaho Courts, and that the defendant be enjoined from in any manner, by process or otherwise, compelling the Sunshine Mining Company to comply with the terms of the [fol. 474] Idaho decrees or any of them, and that the Sun-

shine Mining Company be compelled and restrained perpetually from delivering any of the shares of stock in litigation, or any dividends accrued or to accrue to the defendants herein, or any of them, and that they be required to recognize the plaintiffs as owners of such shares and that such plaintiffs prayed for such other and general relief as may be meet and equitable.

Transfer of Place of Trial

The files (exhibit 7) contain an order transferring the place of trial of the action from Spokane County where the same was commenced to the county of Yakima, entered on the 5th day of February 1937.

[fol. 475] The Court further ordered that said receiver should qualify by giving a bond in the sum of \$500.00.

[fols. 476-502] EXHIBIT "10"

Thereupon Mr. Halverson, solicitor for the Interpleader, offered an exemplified copy of the order appointing Joseph Cheney, Esq., as Receiver, together with a copy of the oath and bond of said Joseph Cheney Esq., which were marked Exhibit "10" and admitted in evidence.

[fol. 503] Exhibit No. 22, offered by the defendants, is a transcript of record of the Supreme Court of the United States, October term, 1936, in a cause wherein John Pelkes and Evelyn H. Treinies were petitioners against Katherine Mason and T. R. Mason, her husband on petition for writ of certiorari to the Supreme Court of the State of Idaho.

Said transcript contains among other things, defendants' exhibit "E", the record from the Superior Court of the State of Washington in and for the County of Spokane in the matter of the estate of Amelia Pelkes, deceased, and includes therein the following documents. Said documents set forth in said transcript the portion therein being referred to as exhibit "E" beginning on page 123, are as follows:

DEFENDANTS' EXHIBIT "E"

[fol. 504] LAST WILL AND TESTAMENT OF AMELIA PELKES

I, Amelia Pelkes, of Spokane, Spokane County, Washington, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament in manner and form following:

I. I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

II. I give, devise and bequeath unto my beloved husband, John Pelkes, and to my beloved daughter, Katherine Mason, of Kellogg, Idaho, share and share alike, all my property, real, personal and mixed, wheresoever situate, to have and to hold the same in equal shares.

III. I hereby nominate and appoint my said beloved husband, John Pelkes, executor of this my last will and testament, and it is my will, and I hereby order and direct that no bonds or other securities shall be required of him and to fully execute this my last will and distribute the estate as herein provided without any application to any court for leave or confirmation and without any intervention of any court unless the same be expressly required by law.

In Witness Whereof, I have hereunto subscribed my name this 25th day of September, A. D. 1918, to this my last will and testament, consisting of one page besides this.
Amelia Pelkes.

The foregoing instrument, consisting of one page besides this, was subscribed, published and declared by Amelia Pelkes as and for her last will and testament in in our [fol. 505] presence and in the presence of each other, and we at the same time, at her request and in her presence and in the presence of each other hereunto subscribe our names as attesting witnesses this 25th day of September, A. D. 1918.

H. V. Davis, Residing at Spokane, Washington.
A. E. Russell, Residing at Spokane, Washington.

Filed Apr. 27, 1922. John Gifford, Clerk; E. L. Perkins, Deputy.

ORDER ADMITTING WILL TO PROBATE

John Pelkes having on the 27th day of April, 1922, submitted to and filed in this Court a certain document in writing of a testamentary nature purporting to be the last will and testament of Amelia Pelkes deceased, and also his petition, praying among other things for the admission to probate of the said document as and for the last will and testament of the said deceased.

And now on formal hearing in open court it fully appearing to the satisfaction of the Court that the said petition sets forth all the facts necessary to give this Court jurisdiction over the estate of the said deceased, and jurisdiction to admit to probate the last will and testament of the said deceased, and witnesses having been examined under oath, and their testimony taken and reduced in writing in open Court, to-wit: The testimony of H. V. Davis and A. E. Russell subscribing witnesses to the said will, and the same having been filed and the evidence being closed, and the matter having been duly and regularly and finally submitted [fol. 506] to the Court for consideration and decision, and all and singular the law and premises being now by the Court here fully understood and duly considered the Court finds the facts applicable to this matter to be as follows:

That the said Amelia Pelkes died testate on the 24th day of April, 1922, at Spokane, Washington, that at the time of her death the said deceased was a resident of Spokane, Washington, and left the estate in said Spokane County subject to administration in Washington.

That the said document, purporting to be the last will and testament of the said Amelia Pelkes deceased, was duly executed by her in her lifetime, to-wit: On the 25th day of September, 1918, at Spokane, Washington, in the presence of at least two competent witnesses, to-wit: H. V. Davis and A. E. Russell, the subscribing witnesses thereto and also that the said deceased then and there in the presence of the said witnesses, published the said documents as, and declared the same to the said witnesses to be her last will and testament, and the witnesses then and there attested the same at her request and in her presence, and in the presence of each other.

That the said deceased at the time of executing the said last will and testament, was over the age of majority, to-wit: of the age of about 70 years, and was of sound and disposing mind and memory and not acting under duress,

menace, fraud nor any undue influence whatsoever, nor in any respect was she incompetent by last will to devise and bequeath her estate.

That John Pelkes is named in the said will as executor; that the said John Pelkes is surviving husband of the said deceased above the age of twenty-one years, and a suitable [fols. 507-572] and competent person to act as executor of the last will and testament of the estate of said deceased.

Now, therefore, by reason of the law and facts aforesaid, it is considered, ordered, adjudged and decreed by the Court here that the jurisdiction to admit to probate the last will and testament of the said deceased appertains unto our said Superior Court; that the said document submitted for probate on the 27th day of April, 1922, is the last will and testament of the said Amelia Pelkes deceased, and that same was properly and legally executed and is entitled to be, and is, hereby admitted to probate.

That a certificate of probate thereof be granted, and that the said last will and testament, together with said certificate, be duly entered of record in the record of wills of this court, as provided by law, and that the said John Pelkes be and he is hereby appointed executor and that he take and file in this Court an oath in due form to the effect that he will faithfully perform the duties of trust as executor.

That no bond is required under the terms of said will.

Done in open Court this 1st day of May, 1922.

Joseph B. Lindsley, Judge.

Filed May 1, 1922. John Gifford, Clerk; E. L. Perkins, Deputy.

Oath of Executor.

[fol. 573]

RECEIPT OF HEIR

[fol. 574] Received of John Pelkes as executor of the Estate of Amelia Pelkes, deceased, the following described property:

1. Bonds of Interstate Utilities Company, also called Interstate Telephone Company Bonds, 6100 shares.

2. Mortgage dated December 1, 1920, executed by John Byrne and Marguerite Byrne, his wife, to John Pelkes, for \$10,000.00 and accrued interest from December 1, 1921, with no payments upon the principal, upon Lot 1 in Block 3 of

Wadsworth & McDonald's Addition to Spokane, Washington due five years after date with interest at 7 per cent payable semi-annually.

3. An undivided one-half interest in and to the following described shares of capital stocks of corporations having been delivered to and held in trust by John Pelkes as trustee for the undersigned:

(a) 30,598 shares of the capital stock of the Sunshine Mining Company, a corporation.

(b) 116,666 $\frac{2}{3}$ shares of the capital stock of the Riverside Copper Mining Company, Ltd., a corporation.

(c) 100,000 shares of the capital stock of the Teddy Mining and Milling Company, Ltd., a corporation.

(d) 10,400 shares of the capital stock of the Little North Fork Copper Mining and Milling Company, Ltd., a corporation.

The undersigned hereby acknowledges receipt from John Pelkes as executor of the estate of Amelia Pelkes, deceased, of her full distributive share of said estate to which she has been, is or may be entitled by virtue of the Decree of Distribution entered in said estate upon the 9th day of August, 1923.

[fols. 575-596] Dated this 22nd day of April, 1935.

Katherine Mason. (Seal.)

STATE OF IDAHO,

County of Shoshone, ss:

On this 22nd day of April, A. D., 1935, before me, Mary A. Miller, a Notary Public in and for the State of Idaho, personally appeared Katherine Mason, personally known to me to be the individual who signed the within and foregoing instrument and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate above written.

Mary A. Miller, Notary Public in and for the State of Idaho, Residing at Kellogg, Idaho. (Notarial Seal.)

Filed Apr. 24, 1935. Frank C. Nash, Clerk.

[fol. 597]

RECEIPT OF HEIR

Received of John Pelkes as executor of the estate of Amelia Pelkes, deceased, the following described property:

1. Bonds of Interstate Utilities Company, also called Interstate Telephone Company Bonds, 6100 shares.

2. Mortgage date- December 1, 1920, executed by John Byrne and Marguerite Byrne, his wife, to John Pelkes, for \$10,000.00 and accrued interest from December 1, 1921, with no payments upon the principal, upon Lot 1 in Block 3 of Wadsworth & McDonald's Addition to Spokane, Washington, due five years after date with interest at 7 per cent payable semi-annually.

3. An undivided one-half interest in and to the following described shares of capital stocks of corporations, having been delivered to and held in trust by John Pelkes as trustee [fol. 598] for the undersigned:

(a) 30,598 shares of the capital stock of the Sunshine Mining Company, a corporation.

(b) 116,666 $\frac{2}{3}$ shares of the capital stock of the Riverside Copper Mining Company, Ltd., a corporation.

(c) 100,000 shares of the capital stock of the Teddy Mining Company, Ltd., a corporation.

(d) 10,400 shares of the capital stock of the Little North Fork Copper Mining and Milling Company, Ltd., a corporation.

The undersigned hereby acknowledges receipt from John Pelkes as executor of the Estate of Amelia Pelkes, deceased, of her full distributive share of said estate to which she has been, is or may be entitled by virtue of the Decree of Distribution entered in said estate upon the 9th day of August, 1923.

Dated this 22nd day of April, 1935.

Katherine Mason. (Seal.)

STATE OF IDAHO,

County of Shoshone, ss:

On this 22nd day of April, A. D., 1935, before me, Mary A. Miller, a Notary Public in and for the State of Idaho, personally appeared Katherine Mason, personally known to me

to be the individual who signed the within and foregoing instrument and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate above written.

Mary A. Miller, Notary Public in and for the State
[fols. 599-600] of Idaho, Residing at Kellogg,
Idaho. (Seal.)

Filed Apr. 24, 1935. Frank C. Nash, Clerk.

[fol. 601] SPECIAL APPEARANCE OF KATHERINE MASON BY
MOTION TO QUASH SERVICE

Comes not Katherine Mason, daughter of above named decedent, appearing herein specially for the purposes of this motion only, and moves the Court to vacate, set aside and quash the alleged or pretended service of Order for Issuance of Citation to Katherine Mason, entered herein on the 3rd day of May, 1935, Citation to Katherine Mason entered herein on the 3rd day of May, 1935, Order for the Issuance of Citation to Katherine Mason and others entered herein on the 3rd day of May, 1935, Citation to Katherine Mason and others entered herein on the 3rd day of May, 1935, Temporary Restraining Order entered herein on the 3rd day of May, 1935, Petition of John Pelkes, verified on the 2nd day of May, 1935, and filed herein on the 3rd day of May, 1935, and Motion and Order directing said Katherine Mason to Show Cause why an Order should not be entered requiring her to submit herself for examination, for the following reasons and upon the following grounds;

[fol. 602] 1. That said Katherine Mason is now and for more than fifty years last past has been a resident of the State of Idaho, and at no time since the 1st day of May, 1935, has she been within the State of Washington, and that none of said Motion, Orders, Citations or Petition were at any time ever served upon her by anybody either within or without the State of Washington.

2. That the only alleged or pretended service ever made on any one of the said Orders, Citations or Petition was in the following manner. That on the 3rd day of May, 1935, J.

W. Greenough, Esquire, a member of the Bar of the State of Washington, handed to Lester S. Harrison and F. C. Keane, and on the 4th day of May, 1935, delivered at the office of Glenn E. Cunningham, a member of the Bar of the State of Washington, in Spokane, Washington, each copies of said Order for the Issuance of Citation to Katherine Mason, said Citation to Katherine Mason, said Order for the Issuance of Citation to Katherine Mason and others, said Citation to Katherine Mason and others, said Temporary Restraining Order and said Petition of John Pelkes. That said Lester S. Harrison, and F. C. Keane are members of the Bar of the State of Idaho residing at Kellogg, Idaho, and Wallace, Idaho, respectively, and were at the time of said alleged or pretended service upon them of said Orders, Citations and Petition in Spokane, Washington, solely for the purpose of and engaged solely in representing said Katherine Mason in a matter then being heard in the Superior Court of Spokane County before the Honorable Fred H. Witt, Judge [fol. 603] thereof, and said alleged or pretended service was made on the said Lester S. Harrison and F. C. Keane in the corridor of the Court House of Spokane County, during the noon recess of said Court held by said Honorable Fred H. Witt in the course of the hearing on said matter. That the only alleged or pretended service ever made of said Motion and Order directing said Katherine Mason to Show Cause why an Order should not be entered requiring her to submit herself for examination was that an uncertified copy of said Motion and Order was delivered at the Office of said Glenn E. Cunningham on the 4th day of May, 1935.

3. That neither said Lester S. Harrison, F. C. Keane nor Glenn E. Cunningham had or have any authority or employment to represent said Katherine Mason in such proceeding instituted by said Petition of John Pelkes, and none of said attorneys had or have any authority or employment to accept, receive, or submit to service for or on behalf of said Katherine Mason as to any of said Motion, Orders, Citations or Petition or any matter in connection with said proceeding instituted by said Petition of John Pelkes.

4. That neither of said Citations nor said Show Cause Order were served upon the said Katherine Mason or anyone by the Sheriff of Spokane County or the Sheriff of any

other county in the State of Washington, as required by Sections 1373 and 1374 of Remington's Revised Statutes of Washington and as required by law.

This motion is based upon the affidavits of Lester S. Harrison, F. C. Keane and Glenn E. Cunningham hereto attached and made a part hereof.

Wherefore the said Katherine Mason prays for an Order of this Court vacating quashing and annulling the service [fol. 604] of said Motion, Orders, Citations and Petition upon and against said Katherine Mason.

Lester S. Harrison, Walter H. Hanson, F. C. Keane, Glenn E. Cunningham, Richard S. Munter, Attorneys for Defendant, Katherine Mason.

Filed May 14, 1935. Frank C. Nash, Clerk.

AFFIDAVIT IN SUPPORT OF SPECIAL APPEARANCE OF KATHERINE
MASON BY MOTION TO QUASH SERVICE

STATE OF WASHINGTON,
County of Spokane, ss:

Lester S. Harrison, F. C. Keane, and Glenn E. Cunningham each being separately duly sworn, and not one for the other depose and say: That Lester S. Harrison and F. C. Keane are members of the Bar of the State of Idaho, the said Lester S. Harrison residing at Kellogg, and the said F. C. Keane residing at Wallace; and that Glenn E. Cunningham is a member of the Bar of the State of Washington residing at Spokane, Washington; that on the 3rd day of May, 1935, they were served with certain orders, citations and petition in Spokane, Washington, in an original proceeding instituted on or about said date wherein an among other things the said John Pelkes, executor of the estate of Amelia Pelkes, deceased, seeks to have the said Katherine Mason sign and file in the above entitled proceeding a certain receipt as therein more particularly referred to designated and described; and that said service was made upon said F. C. Keane and Lester S. Harrison in the corridor of the Courthouse in Spokane County, Washington, at and during the noon recess thereof, by one J. W. Greenough Esq.; that at the time of said service the said

[fol. 605] F. C. Keane and Lester S. Harrison were appearing before the Court Department presided over by the Honorable Fred H. Witt, and had been appearing in said cause during the morning session and had recessed until 1:30 of said day, and were directly engaged in the course of a hearing being conducted in the matter of the Estate of Amelia Pelkes at said time; that thereafter, and on the afternoon of said day the attention of the Honorable Fred H. Witt was called to the proceeding which had been instituted, namely, the service of said orders, citations and petition, and the temporary restraining order that had been issued out of said court, and the said Honorable Fred H. Witt was notified that said proceeding had been started whereupon the Honorable Fred H. Witt raised the question as to whether or not there was any conflict in the proceedings mentioned and the proceedings already pending before him at said time, which, in answer thereto the said Paul H. Graves, and the said Will Graves, members of the law firm of Graves, Kizer & Graves, advised the Honorable Fred H. Witt that the said action so instituted was an original proceeding; that the same was an independent action which they were starting, and that the same was in no wise in conflict with any other or former proceedings that have been taken in the said estate, and that the same was an independent action and had nothing to do with any other proceedings whatsoever, nor in anywise relating thereto.

That service of said orders, citations, petition and temporary restraining order were served upon Glenn E. Cunningham at his office in the Old National Bank Building in Spokane, Washington, on the said 3rd day of May, A. D. [fol. 606] 1935, and that thereafter on the following day the said Glenn E. Cunningham was served by an alleged or pretended service of a motion and order directing the said Katherine Mason to show cause why an order should not be entered requiring her to submit herself for an examination before the above entitled court on the 14th day of May, 1935; that said pretended service was made by delivery of an uncertified copy of said motion and order to the office of said Glenn E. Cunningham in the Old National Bank Building in Spokane, Washington.

That the said Katherine Mason is now and for more than 50 years last past, has been a resident of the State of Idaho, and at no time since the first day of May, 1935 has she been within the State of Washington, and that none of said mo-

tions, orders, citations, restraining orders or petitions have at any time been served upon her by anybody either within or without the State of Washington.

That neither said Lester S. Harrison, F. C. Keane nor Glenn E. Cunningham had or now have, or at any time have had any authority or been employed to represent said Katherine Mason in the proceeding last referred to which is the proceeding instituted by reason of the petition of the said John Pelkes, and that none of said Attorneys have any authority to accept, receive, or submit to service for and on behalf of said Katherine Mason as to any of said motions, citations, orders, or petitions of any nature in connection with said last mentioned proceeding instituted by said petition of John Pelkes.

That neither said citation or said show cause order were served upon the said Katherine Mason or any one by the [fol. 607] Sheriff of Spokane County or the Sheriff of any other County, as required by Section 1373 and 1374 of Remington's Revised Statutes of Washington, and as required by law.

That the above and foregoing affidavit, as aforesaid, is made in support of the special appearance of Katherine Mason made by motion to quash service in said last mentioned proceeding, and it is not made or is it at any time to be construed as a general appearance or an appearance of any kind whatever, but merely made in support of the motion and special appearance of said Katherine Mason in said proceeding.

Lester S. Harrison, F. C. Keane, Glenn E. Cunningham.

Subscriber and sworn to before me this 14th day of May, A. D., 1935. Richard S. Munter, Notary Public in and for the State of Washington, Residing at Spokane. (Seal.)

Filed May 14, 1935. Frank C. Nash, Clerk.

SPECIAL APPEARANCE OF T. R. MASON, LESTER S. HARRISON, WALTER H. HANSON AND F. C. KEAN BY MOTION TO QUASH SERVICE—Filed May 15, 1935. Frank C. Nash, Clerk

Come now T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane appearing severally herein specially for the purposes of this motion only, and move the Court to vacate set aside and quash the alleged or pre-

tended service as to each of the Order for the Issuance of Citation to T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane, entered herein on the 3rd day of May, 1935, Citation to T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane entered herein on the [fol. 608] 3rd day of May, 1935, and Petition of John Pelkes, verified on the 2nd day of May, 1935, and filed herein on the 3rd day of May, 1935, for the following reasons and upon the following grounds:

1. That said T. R. Mason is not a creditor, debtor, heir beneficiary or claimant of the above entitled estate.

2. That said T. R. Mason is now and for more than twenty years last past has been a resident of the State of Idaho and at no time since the 1st day of May, 1935, has he been within the State of Washington, and that none of said Orders, Citations or Petition were at any time ever served upon him by anybody either within or without the State of Washington.

3. That the only alleged or pretended service ever made on any one of said Orders, Citations or Petition was in the following manner. That on the 3rd day of May, 1935, J. W. Greenough, Esquire, a member of the Bar of the State of Washington, handed to Lester S. Harrison and F. C. Keane, and on the 4th day of May, 1935, delivered at the office of Glenn E. Cunningham, a member of the Bar of the State of Washington, in Spokane, Washington, each copies of an Order for the Issuance of Citation to Katherine Mason, a Citation to Katherine Mason, said Order for the Issuance of Citation to Katherine Mason and the parties specially appearing by this motion, said Citation to Katherine Mason and the parties specially appearing by this motion, said Temporary Restraining Order, and said Petition of John Pelkes. That said Lester S. Harrison and F. C. Keane are members of the Bar of the State of Idaho residing at Kellogg, Idaho, and Wallace, Idaho, respectively, and were at the time of said alleged or pretended service upon them of said Orders, Citations and Petition in Spokane, [fol. 609] Washington, solely for the purpose of and engaged solely for the purpose in representing said Katherine Mason in a matter then being heard in the Superior Court of Spokane County, before the Honorable Fred H. Witt, Judge thereof, and said alleged or pretended service was

made on the said Lester S. Harrison, and F. C. Keane, in the corridor of the Court House of Spokane, County, during the noon recess of said Court held by said Honorable Fred H. Witt in the course of the hearing on said matter.

4. That neither said Lester S. Harrison, F. C. Keane nor Glenn E. Cunningham had or have any authority or employment to represent said T. R. Mason in such proceeding instituted by said Petition of John Pelkes, and none of said attorneys had or have any authority of employment to accept, receive, or submit to service for or on behalf of said T. R. Mason as to any of said Orders, Citations or Petition or any matter in connection with said proceeding instituted by said Petition of John Pelkes.

5. That neither said Lester S. Harrison, Walter H. Harrison, nor F. C. Keane are neither creditors, debtors, heirs, beneficiaries or claimants of the above entitled estate.

6. That neither of said Citations were served upon either the said Lester S. Harrison, Walter H. Hanson, F. C. Keane or anyone by the Sheriff of Spokane County or the Sheriff of any other county in the State of Washington, as required by Sections 1373 and 1374 of Remington's Revised Statutes of Washington, and as required by law.

This motion is based upon the affidavits of Lester S. Harrison, F. C. Keane and Glenn E. Cunningham hereto attached [fol. 610] and made a part hereof.

Wherefore, the said T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane severally pray for an Order of this Court vacating, quashing and annulling the services of said Orders, Citations and Petition upon and against each of said parties specially appearing herein.

Richard S. Munter, Glenn E. Cunningham, Attorneys
for T. R. Mason, Lester S. Harrison, Walter H.
Hanson and F. C. Keane.

AFFIDAVIT IN SUPPORT OF SPECIAL APPEARANCE OF T. R.
MASON, LESTER S. HARRISON, WALTER H. HANSON AND F. C.
KEANE

STATE OF WASHINGTON,
County of Spokane, ss:

Lester S. Harrison, F. C. Keane and Glenn E. Cunningham, each being separately duly sworn, depose and say each for himself and not one for the other.

Affiants incorporate as a part of this affidavit as fully as if set forth herein in full their whole affidavit made herein in support of the Special Appearance of Katherine Mason by Motion to Quash Service and swear that the matters and things therein set forth are true.

That neither said T. R. Mason, Lester R. Harrison, Wallace H. Hanson nor F. C. Keane are either creditors, debtors, heirs, beneficiaries or claimants of the above entitled estate.

That said T. R. Mason is now and for more than twenty years last past has been a resident of the State of Idaho, and at no time since the 1st day of May, 1935, has been within the State of Washington, and that none of the Orders, Citations or Petition described in the special appearance [fol. 611] herein were at any time ever served upon said T. R. Mason by anybody either within or without the State of Washington.

That the only alleged or pretended service ever made on any one of said Orders, Citations or Petition was in the following manner. That on the 3rd day of May, 1935, J. W. Greenough, Esquire, a member of the Bar of the State of Washington, handed to Lester S. Harrison and F. C. Keane and on the 4th day of May, 1935, delivered at the office of Glen E. Cunningham, a member of the Bar of the State of Washington, in Spokane, Washington, each copies of an Order for the Issuance of Citation to Katherine Mason, a Citation to Katherine Mason, said Order for the Issuance of Citation to Katherine Mason and the parties specially appearing by this motion, said Citation to Katherine Mason and the parties psecially appearing by this motion, said Temporary Restraining Order, and said Petition of John Pelkes. That said Lester S. Harrison and F. C. Keane are members of the Bar of the State of Idaho residing at Kellogg, Idaho, and Wallace, Idaho, respectively, and were at the time of said alleged or pretended service upon them of said Orders, Citations and Petition in Spokane, Washington, solely for the purpose of and engaged solely in representing said Katherine Mason in a matter then being heard in the Superior Court of Spokane County before the Honorable Fred H. Witt, Judge thereof, and said alleged or pretended service was made on the said Lester S. Harrison and F. C. Keane in the corridor of the Court House of Spokane County, during the noon recess of said Court held by said Honorable Fred H. Witt in the course of the hearing on said matter.

[fol. 612] That neither said Lester S. Harrison, F. C. Keane nor Glenn E. Cunningham had or have any authority or employment to represent said T. R. Mason in such proceeding instituted by said Petition of John Pelkes, and none of said attorneys had or have any authority or employment to accept, receive, or submit to service for or on behalf of said T. R. Mason as to any of said Orders, Citations or Petition or any matter in connection with said proceeding instituted by said Petition of John Pelkes.

That neither of said Citations were served upon either the said Lester S. Harrison, Walter H. Hanson, F. C. Keane or anyone by the Sheriff of Spokane County of the Sheriff of any other county in the State of Washington, as required by Sections 1373 and 1374 of Remington's Revised Statutes of Washington, and as required by law.

That the above and foregoing affidavit is made in support of the special appearance of T. R. Mason, Lester S. Harrison, Walter H. Hanson and F. C. Keane in said proceeding instituted by John Pelkes, and is not made or is it at any time to be construed as a general appearance or an appearance of any kind except as a part of and in support of said special appearance by motion to quash.

Lester S. Harrison, F. C. Keane, Glenn E. Cunningham.

Subscribed and sworn to before me this 15th day of May, 1935. Richard S. Munter, Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Filed May 15, 1935. Frank C. Nash, Clerk.

[fol. 613]

RECEIPT OF HEIR

The undersigned hereby acknowledges receipt from John Pelkes as executor of the Estate of Amelia Pelkes, deceased, of her full distributive share of said estate to which she has been, is or may be entitled by virtue of the Decree of Distribution entered in said estate upon the 9th day of August, 1923.

Dated this 22nd day of April, 1935.

Katherine Mason.

STATE OF IDAHO,
County of Shoshone, ss:

On this 22nd day of April, A. D., 1935, before me, Mary [fol. 614] A. Miller, a Notary Public in and for the State of Idaho, personally appeared Katherine Mason, personally known to me to be the individual who signed the within and foregoing instrument and acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

Mary A. Miller, Notary Public in and for the State of Idaho, residing at Kellogg, Idaho. (Seal.)

Filed May 17, 1935. Frank C. Nash, Clerk.

RECEIPT OF HEIR AND BENEFICIARY

Received of John Pelkes as executor of the estate of Amelia Pelkes, deceased, in accordance with the terms of the Decree of Distribution entered in said estate on the 9th day of August, 1923, an undivided one-fourth interest in and to the following described property:

E 132 feet Lots 1 and 2, Block 7 of Stratton's addition to Spokane, Washington, appraised at value, \$2,750.00.	
Lot 4 in Block 56 Muzzy's Addition to Spokane,	
Washington, unpaid balance on sale contract . .	1,640.00
I. C. O. F. promissory note, described in inventory	1,000.00
T. R. Mason promissory note, described in inventory	1,000.00
John Byrne & wife mortgage, described in inventory	10,000.00
Bonds of Interstate Utilities Company, also called Interstate Telephone Company bonds, 6000 [fols. 615-617] shares, of the appraised value of . .	5,100.00
Cash on hand	10,024.33

Dated this 2nd day of May, 1935.

Katherine Mason. (Seal.)

STATE OF IDAHO,
County of Shoshone, ss:

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this 2nd day of May, 1935, personally appeared before me Lester S. Harrison to me known to be the individual described in and who executed the within instrument, and acknowledged that she signed and sealed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

Lester S. Harrison, Notary Public for State of Idaho,
Residing at Kellogg. (Seal.)

Filed May 17, 1935. Frank C. Nash, Clerk.

[fol. 618] MOTION FOR RULE TO PLEAD

John Pelkes, executor of the Estate of Amelia Pelkes Deceased, moves the court for a rule upon Katherine Mason to plead to the petition heretofore filed herein by the said John Pelkes, as executor, praying a winding up of the affairs of the Estate of Amelia Pelkes, Deceased, and the discharge of the said John Pelkes as executor thereof.

This motion is based upon the files and records in this proceeding, and the affidavit of W. G. Graves attached hereto.

Dated May 21, 1935.

Graves, Kizer & Graves, Attorneys for John Pelkes,
as Executor of the Estate of Amelia Pelkes, Deceased.

AFFIDAVIT OF W. G. GRAVES

STATE OF WASHINGTON,
County of Spokane, ss:

W. G. Graves, being first duly sworn, says: That he is a member of the firm of Graves, Kizer & Graves, and is one [fol. 619] of the counsel for John Pelkes, as executor of the estate of Amelia Pelkes, deceased. A petition seeking a winding up of the affairs of said estate and the discharge

of the said John Pelkes as executor thereof was filed in this court and cause upon, to wit, May 3, 1935, and was served the same day upon the attorneys for Katherine Mason one of the beneficiaries of such estate. Thereafter, beginning upon, to wit, May 15, 1935, and continuing several days thereafter, arguments were heard before the Honorable Joseph B. Lindsley, a Judge of this Court, upon sundry motions and applications growing out of the filing and the service of said petition, resulting in orders denying the motion of Katherine Mason, appearing specially to vacate and quash the service of such petition upon her through her attorneys, granting an injunction pendente lite restraining her from the further prosecution of an action pending in a District Court of the State of Idaho involving the title to the shares of stock of the Sunshine Mining Company, which is the subject matter of this petition, and the making of an order requiring Katherine Mason to appear in this court and give her deposition on June 3, 1935. Immediately upon the making of the last of these orders T. R. Mason, husband of Katherine Mason and joined with her as a party plaintiff in the action in a District Court of Idaho, referred to in this petition and the proceedings relating thereto, went before a judge in the District Court of Idaho and procured a restraining order purporting to restrain John Pelkes and Katherine Mason and their respective agents and attorneys from taking any other steps wh-tsoever in this proceeding. [fol. 620] A copy of such restraining order was served upon W. G. Graves and Graves, Kizer & Graves on May, 1935. Counsel for Katherine Mason now refuse to plead to the petition aforesaid or to take any further steps herein because of the issuance of such restraining order. Affiant further says that upon the application of T. R. Mason a District Judge of the District of Idaho has, without notice, set the Idaho action heretofore and in the petition and proceedings growing out thereof mentioned for trial upon the defendants' plea in abatement and upon the merits for Wednesday, June 5, 1935, at 10 o'clock a. m.

W. G. Graves.

Subscribed and sworn to before me this 23d day of May, 1935. T. A. Dunn, Notary Public in and for the State of Washington, Residing at Spokane.

Filed May 23, 1935. Frank C. Nash, Clerk.

ORDER TO PLEAD

Upon motion of John Pelkes, executor of the Estate of Amelia Pelkes, deceased, for a rule upon Katherine Mason to plead to the petition of the said executor referred to in the motion papers,

It is ordered that Katherine Mason forthwith plead to the said petition, or that she show cause before me on Saturday, May 25, 1935, at the hour of 9:30 a. m., why she should not do so. The pleading to such petition shall be in the nature of an answer or return thereto, but its form shall not prevent the said Katherine Mason from raising any questions of law upon such petition which appear upon the face thereof or in connection with her answer or return thereto. [fol. 621] Dated May 23, 1935.

Wm. A. Huneke, Presiding Judge.

Presented by W. G. Graves.

Filed May 23, 1935. Frank C. Nash, Clerk.

SHOWING IN RESPONSE TO ORDER TO PLEAD BY SPECIAL APPEARANCE—Filed May 25, 1935. Frank C. Nash, Clerk

Comes now Katherine Mason appearing specially only and preserving and continuing herein the special appearance heretofore made and maintained by her throughout these proceedings, in response to the order of this court dated May 23, 1935, requiring her to plead to the petition on file herein or show cause why she should not do so, and respectfully makes the following showing:

I. That Katherine Mason now is and for more that fifty years continuously last past has been a resident and a citizen of the State of Idaho residing at Kellogg, Shoshone County, State of Idaho, which is located within the boundaries of the First Judicial District of the State of Idaho, in and for the County of Shoshone. That she is one of the plaintiffs in that certain cause now pending in the Court aforesaid entitled, "Katherine Mason and T. R. Mason, her husband, Plaintiffs, vs. John Pelkes, Frances Thinnes and Pierre Thinnes, her husband, Evelyn H. Trienies and Sunshine Mining Company, a Corporation, Defendants." That on or about the 21st day of May, 1935, in said cause pending in Idaho, said District Court of the First Judicial District

f the State of Idaho made an order restraining her and other parties and the attorneys for other parties to said Idaho action, namely, Wm. B. Hornblower, J. H. Hull, Graves, Kizer and Graves, Will Graves, Paul Graves and their clients John Pelkes and Evelyn Treinies, and Lester [fol. 622] S. Harrison, Walter H. Hanson, F. C. Keane, Glenn E. Cunningham and Richard S. Munter, the attorneys for said Katherine Mason, from taking any further proceedings in this cause and probate proceedings of the Estate of Amelia Pelkes, deceased, now pending in the Superior Court of the State of Washington, in and for the County of Spokane until the further order of said Idaho Court. That all of the parties and attorneys so restrained have been served with or have notice of said restraining order so issued by said Idaho Court. That said restraining order was personally served upon her within the jurisdiction of the District Court for the First Judicial District of the State of Idaho, in and for the County of Shoshone, after the entry thereof, and is now in full force and effect, a true and correct copy of said order being attached hereto and by reference made a part of this pleading.

Dated at Spokane, Washington, this 25th day of May, 1935.

Lester S. Harrison, Walter H. Hanson, F. C. Keane,
Glenn E. Cunningham, Richard S. Munter, At-
torneys for Katherine Mason.

STATE OF WASHINGTON,
County of Spokane, ss:

Richard S. Munter, being first duly sworn upon oath deposes and says: That he is one of counsel for Katherine Mason, and makes this verification upon information and belief for the reason that said Katherine Mason is not within the County of Spokane; that he has read the foregoing showing, knows the contents thereof, and believes the same to be true.

[fols. 623-624]

Richard S. Munter.

Subscribed and sworn to before me this 25th day of May, 1935. Glenn E. Cunningham, Notary Public in and for the State of Washington, Residing at Spokane.

Copy recd. 5-25-35. Graves, Kizer & Graves.

[fols. 625-628]

ORDER TO PLEAD

On this 25th day of May, 1935, this cause came regularly on for hearing by the Court on the motion of John Pelkes executor for a rule upon Katherine Mason to plead to his petition filed in this cause, and the said Mason appearing specially by counsel in opposition to the motion, and after hearing said motion and the argument of counsel and the Court—

Ordered, That said motion be, and the same is hereby granted, the rule to plead is made absolute, and Katherine Mason is ordered to plead to the petition of John Pelkes aforesaid on or before Monday, May 27, 1935, at the hour of 10 o'clock A. M., such pleading to be by way of answer on return to the petition.

Done in open court this 25 day of May, 1935.

Wm. A. Huneke, Judge.

Attorney W. G. Graves.

Filed May 25, 1935. Frank C. Nash, Clerk.

[fol. 629] FINDINGS AND ORDER APPROVING PARTITION, CORRECTING RECEIPTS FOR DISTRIBUTIVE SHARES AND DISCHARGING EXECUTOR

This cause came on for hearing on this day upon the petition of John Pelkes, executor of the will of Amelia Pelkes, deceased, for a consideration of the distribution of the property passing under her will and the decree of distribution rendered herein, for an examination and an approval or correction of the receipts of beneficiaries filed herein, and for an order closing the estate of Amelia Pelkes and discharging him as executor of her will. From the evidence submitted I find the following facts:

[fol. 630] 1. This cause was instituted April 27, 1922, by the filing in this court and cause of the will of Amelia Pelkes, deceased, accompanied by a petition for its admission to probate. After provision for the payment of debts and funeral expenses, the will gave, devised and bequeathed unto the testatrix' husband, John Pelkes, and unto her daughter, Katherine Mason, share and share alike, all her property of whatsoever character and wheresoever situated. John Pelkes, husband, was nominated as executor of the

will. The petition of John Pelkes, which was filed with the will, showed that he was the husband of Amelia Pelkes, that she was late a resident of Spokane County, Washington, and died in that County, leaving estate therein. In due course the will was admitted to probate by this court, and John Pelkes was appointed executor of the will and qualified as such. He has continued in that position and relation to this court until the present time.

2. All the property of which Amelia Pelkes died seized was the community property of herself and John Pelkes and her devisable interest therein was limited to a one half interest in the entire property. Under the terms of her will, her husband would take a three fourths interest in the entire estate and her daughter would take one fourth interest therein.

3. Among other property owned by the community of John and Amelia Pelkes at the time of Amelia's death were many shares of stock in the mining companies whose properties were in the Coeur d'Alene mining district, where the Pelkes had lived for many years. Included in these shares were 30,598 shares of stock of the Sunshine Mining Company, a corporation organized and existing under the laws of the State of Washington. Those shares will hereafter be generally referred to as the shares in litigation. None of the shares had any market value, and none other than an uncertain, wholly speculative value, until approximately 1928, when the shares in litigation began to be considered to possess some small value. None of the other shares ever attained any value.

4. When the property of the estate of Amelia Pelkes was inventoried for administration purposes, none of the mining shares aforesaid were inventoried, nor were they then or thereafter, until the institution of the current litigation, referred to in the administration proceeding or in any way administered on. The existence of these shares, and their ownership by the Amelia Pelkes estate, were known to both John Pelkes and Katherine Mason, and they were not included in the inventory of the property of the estate, nor administered upon, because both believed the shares to be valueless.

5. July 12, 1923, John Pelkes filed in this court and cause his final report and petition for distribution as executor of

the will of Amelia Pelkes. This report showed as property of the estate received from all sources the property described in the original and supplemental inventories then on file, which did not include any corporate shares, which property had an appraised value of \$32,450, as money collected by the executor from the property of the estate, \$12,344.50, as disbursements for al- purposes, \$2,320.17, and as remaining on hand for distribution the following described property:

[fol. 632] "E. 133 Ft. Lots 1 and 2, B. 7 of Stratton's Addition to Spokane, Wash. Appraised value	2,750.00
Lot 4 in B. 56 Muzzy's Add. to Spokane, Wash., unpaid balance on sale contract	1,640.00
I. O. O. F. promissory note, described in inventory	1,000.00
T. R. Mason promissory note, described in inventory	1,000.00
John Byrne & wife mortgage, described in inventory	10,000.00
Cash on hand	10,024.33
O. K. Katherine Mason."	

This report and description of property was endorsed by Katherine Mason in the body thereof: "O. K. Katherine Mason."

6. In due course the aforesaid final report and petition for distribution came on for hearing before this court, and on August 9, 1923, a decree of distribution was rendered thereon which recited that the residue of the estate after administration, consisting of the property thereafter particularly described, was ready for distribution and the estate ready to be closed. The decree found (1) that the whole of the estate was community property, (2) that Amelia Pelkes died testate in the City and County of Spokane leaving a community or undivided one half interest in the property described in the general and supplemental inventories, (3) that John Pelkes, husband, Katherine Mason, daughter, were the only heirs, legatees and devisees of the decedent, (4) that the executor's final report and account was approved and allowed. It was then provided as follows:

[fol. 633] "It is Hereby Ordered, Adjudged and Decreed, That the residue of said estate of Amelia Pelkes, deceased, hereinafter particular- described, and now remaining in the

ands of said executor and any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit:

John Pelkes, husband, Spokane, Washington, an undivided one-half interest thereof; Katherine Mason, daughter, Kellogg, Idaho, an undivided one-half interest thereof. By this decree the said John Pelkes becomes the owner of an undivided three-fourths interest in the property described in the inventories on file herein, or the proceeds thereof, and the said Katherine Mason becomes the owner of the remaining one-fourth interest, undivided, in said property, the said John Pelkes being the owner of a community or undivided one-half interest of said property at the time of the death of his wife, the said Amelia Pelkes.

The following is a particular description of said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, as aforesaid, to-wit:

. 132 feet Lots 1 and 2, Block 7 of Stratton's Addition to Spokane, Washington, appraised value	\$2,750.00
ot 4 in Block 56, Muzzy's Addition to Spokane, Washington, unpaid balance on sale contract ..	1,640.00
O. O. F. promissory note, described in inventory ..	1,000.00
. R. Mason promissory note, described in inventory ..	1,000.00
[Vol. 634] tory	1,000.00
ohn Byrne and wife mortgage, described in inventory	10,000.00
bonds of Interstate Utilities Company, also called Interstate Telephone Company bonds, 6000 shares, of the appraised value of	5,100.00
ash on hand	10,024.33

It is Further Ordered, that said executor deliver the said estate to the beneficiaries above named and file his receipt therefor in this court".

7. Katherine Mason is a daughter of Amelia Pelkes by a former marriage, but from the time of the marriage of John Pelkes and Amelia Pelkes, when Katherine was eight years of age, until her marriage, she made her home with them, and John Pelkes had for her the affection of a father

and treated her as his daughter. That affectionate relationship continued until some years after the death of Amelia Pelkes. Upon the rendition of the decree of distribution aforesaid, and before any further steps had been taken in the cause, Katherine Mason discussed with John Pelkes a partition of the estate to which they were jointly entitled under the will of Amelia Pelkes. He was then 70 years of age she was 44. She had long been married, and resided with her husband, a physician, at Kellogg, Idaho, within a few miles of the properties of the Sunshine Mining Company. She desired such a partition of the property of the estate as would give her in her sold and undivided right liquid assets which she could realize upon as she desired during the next few years. John Pelkes was willing that she should receive her share in such form as she desired, [fol. 635] and it was agreed between them that he would deliver to her a mortgage for \$10,000 on property in Spokane, which had an appraised value of \$10,000, 6,000 bonds of the Interstate Utilities Company of the appraised value of \$5,100.00 and a promissory note of her husband, T. R. Mason, for \$1,000, and that those items should be received by her in full settlement and discharge of her distributive share of the estate of Amelia Pelkes; that, in consideration of her receiving that property, all the remainder of the property of the estate should go to and be received by John Pelkes in his sole and undivided right, in full settlement and discharge of this distributive share of the estate of Amelia Pelkes. In making this agreement, both parties had in mind the shares of mining stock belonging to the estate, including the shares in litigation, which had not been inventoried or administered on, and both intended and agreed that all those shares should go to and be received by John Pelkes in his sole right as a part of the distributive share of the estate to which he was entitled.

8. The partition agreement was fully performed so far as partition of the property was concerned. Katherine Mason received from John Pelkes, the property to which she was entitled thereunder and thereafter held and enjoyed it in her sole right. John Pelkes took the remainder of the property of the estate and held and disposed of it as his own. No receipts were given for the property received, no paper was executed or filed in court, and no steps were taken to close the estate, and the cause continued on the records of

his court unclosed and without distribution of the property of the estate. Affairs so continued until 1934. About 1928 work done on the properties of the Sunshine Mining Company showed value therein, and the stock in litigation began to have apparent value. As work progressed the mines began to pay return and dividends were declared on the Company's shares, and by 1934 the shares in litigation had a substantial market value. During that year, Katherine Mason and her husband, T. R. Mason, began an action in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, against John Pelkes and others claiming to have an interest in the shares in litigation. In the complaint in that action the plaintiffs alleged the existence of the community of John and Amelia Pelkes and its ownership of the shares in litigation; that Amelia Pelkes died a resident of Spokane County, Washington, leaving as her sole heirs at law John Pelkes and Katherine Mason; that the estate of Amelia Pelkes was probated in the Superior Court of the State of Washington for Spokane County, the place of her domicile at the time of her death that a settlement of all the assets belonging to the estate was had between John Pelkes and Katherine Mason, by virtue of which each became the owner of a one half interest in 30,598 shares of the capital stock of the Sunshine Mining Company; that it was further agreed John Pelkes should hold title to Katherine Mason's one half interest in the shares and would convey such interest to her upon demand and if and when the shares became of value, it being alleged that the shares at the time of the agreement were of practically no value, save a prospective value. Breaches of the duty of John Pelkes to hold Katherine Mason's one half of the shares for her, and to convey to her as agreed were alleged, and the prayer of the complaint among other things, was that Katherine Mason should be decreed to be the owner of 15,299 shares of the stock of the Sunshine Mining Company, and that John Pelkes held such shares in trust for her. The Sunshine Company was joined as defendant, and it was enjoined pendente lite from permitting any transfer of the shares in litigation, and the final relief prayed against it was that it cancel the outstanding certificates for the shares in litigation and issue in lieu thereof a certificate to plaintiffs for 15,299 shares.

9. While the aforesaid action was pending, Katherine Mason filed in this court and cause a petition praying the removal of John Pelkes as executor of the will and estate of Amelia Pelkes and the appointment of an administrator with the will annexed to complete the administration of the estate. In that petition, which was verified by her, she alleged the probate of the will of Amelia Pelkes in this court, the appointment of John Pelkes as executor, the making of the decree of distribution, and the distribution of certain property of the estate to her and to John Pelkes, and that

“ * * * no proceedings were ever had or have been had to finally close said estate and that said executor has never received a discharge nor filed any receipts from your petitioner for her distributive share of said estate.”

The petition further alleged that amongst other property of the estate of Amelia Pelkes were 30,598 shares of the Sun-[fol. 638] shine Mining Company, a number of shares of other mining companies, specifically describing them and \$10,024 in cash; that none of that property was inventoried or administered upon although the property

“ * * * and all of it was an asset belonging to the estate of said Amelia Pelkes, deceased, and subject to probate in the above entitled court and proceeding.”

and that

“ * * * the said John Pelkes, executor of said estate, has wasted and/or embezzled all of said property and that he has committed a fraud upon the estate and that he now is incompetent to act. * * * ”

Other matters were alleged for the purpose of showing the incompetency of John Pelkes further to act as executor, e. g., his age (84 years), infirm health, removal from the State of Washington, neglect of his duties. Then it was alleged:

“That under the terms of said will aforesaid, your petitioner is entitled to have distributed to her an interest in each and all of the property and effects as hereinbefore particularly described and that it is necessary that in order to complete the probate of said estate aforesaid, that some competent person be appointed as the administrator with the

will annexed and of said estate. Your petitioner, being a daughter of said decedent and entitled under the terms of said will as aforesaid to share in said estate, hereby nominates C. Harold Easter, a person over the age of twenty-one (21) years and competent in all ways to administer said estate as the administrator with the will annexed to said [Vol. 639] estate, and that upon the revocation of letters testamentary heretofore issued to the said John Pelkes, your petitioner requests that letters of administration with the will annexed issue to the said C. Harold Easter."

The prayer of the petition was:

"Wherefore, your petitioner prays that a citation issue to the above named John Pelkes, requiring him to show cause at a time and place to be fixed by the court why he should not be removed as the executor of said estate and why letters of administration should not issue to some competent person, and requiring him further to show cause, if any he has, why said property as above described as well as and together with all other property which has at any time come to his hands as such executor, should not be delivered over to the administrator with the will annexed to be appointed by this court, and why said purported decree of distribution heretofore entered in the above entitled court and cause should not be set aside, vacated and held for naught. Petitioner further prays that at said time and place the said decree of distribution by order of this court be set aside, vacated and held for naught; that the appointment of John Pelkes as the executor of said estate be vacated, set aside and held for naught, and that by said order he be required to forthwith deliver over to his successor to be named by this court all of the property hereinbefore mentioned, and that he be required to fully account to this court and to his successor therein for everything belonging to said estate which he now has or which he ever has had belonging to the estate."

[Vol. 640] With this petition was presented a petition of C. Harold Easter, Katherine Mason's nominee for appointment as administrator c. t. a. This petition followed generally the lines of Katherine Mason's petition, specifically alleging that the estate had never been closed, the executor had never received a discharge nor filed receipts from the persons entitled to distributive shares, and that "the said

estate is subject and should be further administered upon." Proceeding, the petition alleged that the petitioner was informed Katherine Mason had filed a petition praying revocation of the letters testamentary issued to John Pelkes and the appointment of some competent person as administrator c. t. a. "to take charge of the assets of said estate and further administer thereon until such administration is fully completed," and that he had been requested by Katherine Mason "to assume the duties of said trust." Considerable space was then devoted to stating Easter's qualifications to complete the administration of the estate, and then it is stated

"That the undersigned, Katherine Mason, is the identical Katherine Mason who heretofore filed a petition for the revocation of letters testamentary of said John Pelkes and at this time states that she has read the above and foregoing petition and knows the contents thereof and states that the facts therein related and states are true in all respects; that she is acquainted with the said petitioner, C. Harold Easter, and that he is petitioning at her request and further states that he is in everywise competent to serve and act as such administrator with the will annexed and hereby joins in his said petition and requests the court [fol. 641] to appoint the said C. Harold Easter to assume and perform the duties of the trust of further administering upon the matters of and affairs of said estate."

This petition was signed by both Easter and Katherine Mason, and by the attorneys who represent the plaintiffs in the Idaho action, and who have represented Katherine Mason in all steps taken by her in this court and cause.

10. John Pelkes appeared in obedience to citations issued upon the aforesaid petitions. Answering the petitions, he pleaded a number of affirmative defenses and a cross-petition in which he joined with Katherine Mason in her assertion of necessity and request for further administration upon the estate of Amelia Pelkes. It is only necessary to refer to the cross-petition. It alleged (in substance) that the administration of the estate of Amelia Pelkes was still pending in this court; that although a decree of distribution had been rendered therein, the property of the estate had not been distributed in accordance with its terms or those of the testatrix' will but in accordance with an arrangement for a different distribution agreed to by the beneficiaries

under the will; that no hearing had been had with respect to the distribution agreed to and it had never been approved or submitted to the court, no receipts from the beneficiaries had been approved, filed or given, and that the executor had not been discharged. Upon the petitions and cross-petitions Pelkes applied for and obtained a temporary restraining order, restraining Katherine Mason from further prosecution of the Idaho action until the administration upon the estate of Amelia Pelkes in this Court was closed, and an order requiring her to appear before this court and [fol. 642] give her deposition concerning the matters pleaded in the petitions and cross-petition. Thereupon Katherine Mason and T. R. Mason, her husband severally applied (but appearing by the same counsel) to the Supreme Court of the State of Washington for a writ of prohibition to prevent this court making and enforcing the restraining order or the order requiring Mrs. Mason to give her deposition. The writs of prohibition were denied, and upon this court taking steps to make and enforce the orders, Mrs. Mason moved to dismiss the petitions. The motion was opposed by Pelkes, but this court indicated that her motion would be granted upon the precedent condition that she pay certain costs and expenses incurred through and in consequence of the proceedings instituted by the filing of her petitions. She has not paid those costs and expenses, her petitions and the proceeding instituted thereby have not been dismissed, and the proceeding is now pending upon the petitions and Pelkes answer and cross-petition.

11. Upon the announcement of the conditional order of dismissal, John Pelkes as executor filed in this court and cause the petition upon which this hearing is had. That petition sets out substantially the matters pleaded in the answers and cross-petition of Pelkes to the petitions filed by Mason heretofore referred to. It appears therefrom that the administration of the estate of Amelia Pelkes is pending in this court, and that further steps must be taken, further hearings be had, and further orders be made before the administration can be closed. On this petition Pelkes obtained a temporary restraining order, restraining Mrs. Mason from prosecuting the action in Idaho until the administration of [fol. 643] the Amelia Pelkes estate was completed, and an order requiring her to show cause why she should not appear in this court and give her deposition. The petition,

the temporary restraining order, and the motion for an order requiring her to give her deposition, were served upon the attorneys for Mrs. Mason who are and at all times have been representing her in the proceedings relating to the estate of Amelia Pelkes heretofore referred to. I find that such service was a good and sufficient service upon Katherine Mason, and that thereby she was subjected to the jurisdiction of this court for all the purposes of the petition and of closing the estate of Amelia Pelkes, and discharging John Pelkes as executor thereof.

12. In response to the motions served upon Katherine Mason her attorneys appeared specially for the purpose of moving to vacate and quash the service made upon her and object to the jurisdiction of this court over her. The motion was denied and the objection overruled. Preserving their special appearance, Mrs. Mason's counsel objected to the continuance of the restraining order pendente lite. After two days' argument their objections were overruled and an injunction pendente lite was granted restraining Katherine Mason and T. R. Mason as her agent or claiming any interest from or through her for prosecution of the Idaho action or from taking any steps therein pending the disposition of the Amelia Pelkes estate in this court and the discharging of John Pelkes as executor thereof. On the next day, the motion to require Katherine Mason to give her deposition was granted over the objection of her counsel, appearing specially, and she was required to appear and depose on June 3.

[fol. 644] 13. While the aforesaid proceedings were in progress in this court, T. R. Mason affected to employ counsel in Idaho other than those who represented him and his wife in the Idaho action and in the proceedings taken by him and by her in this court, and upon this court issuing an injunction pendente lite on the Pelkes petition, he procured from the Idaho court in which was pending the Idaho action aforesaid a temporary restraining order restraining John Pelkes, his attorneys, and all persons claiming by or through him, and Katherine Mason, her attorneys, and all persons claims through her, from taking any steps or doing anything in this court and cause. I find that proceeding to be factitious, not prosecuted in good faith, and that the Idaho court was without jurisdiction to enjoin John Pelkes, an officer of this court, from taking such steps as

may be necessary or proper in the discharge of his functions as such officer. Neither was there jurisdiction, in view of the scope of the Idaho action, to enjoin Katherine Mason, a claimant to property of an estate in process of administration by this court from participating in the disposition and closing of the estate.

14. After the issuance of the Idaho injunction, a rule to plead to the Pelkes petition was served upon Katherine Mason's attorneys in this cause. The only showing in response to such rule was the issuance of the restraining order in the Idaho action. The rule was made absolute, but neither she nor any one for her has plead or in any other way appeared against the petition save by the special appearances heretofore referred to.

15. The agreement for distribution of the property of [fol. 645] the estate which was made by John Pelkes and Katherine Mason after the entry of the decree of distribution was in all respects fair and equitable so far as concerned Katherine Mason. It was not affected by fraud, mistake, or undue influence. Both parties entered into it with all material factors in mind, and through it Mrs. Mason received several thousand dollars more than she would have been entitled to under this will of Amelia Pelkes or the decree of distribution. The adventitious discovery of ore bodies in the properties of the Sunshine Mining Company several years after the agreement was made is the only occasion for attack upon it.

16. On April 24, 1935, when or soon after Katherine Mason moved to dismiss the petitions she had filed for the removal of Pelkes as executor and the appointment of an administrator c. t. a. to complete the administration of the Amelia Pelkes' estate, she filed herein a paper entitled "Receipt of Heir", bearing date April 22, 1935, which was of the following tenor (omitting titles, date, signature and verification):

"Received of John Pelkes as executor of the estate of Amelia Pelkes, deceased, the following described property:

1. Bonds of Interstate Utilities Company, also called Interstate Telephone Company Bonds, 6100 shares.

2. Mortgage dated December 1, 1920, executed by John Byrne and Marguerite Byrne, his wife, to John Pelkes, for

\$10,000.00 and accrued interest from December 1, 1921, with no payments upon the principal upon Lot 1 in Block 3, of Wadsworth & McDonald's Addition to Spokane, Washington, due five years after date with interest at 7 per cent payable semi-annually.

[fol. 646] 3. An undivided one-half interest in and to the following described shares of capital stocks of corporations, having been delivered to and held in trust by John Pelkes as trustee for the undersigned.

(a) 30,598 shares of the capital stock of the Sunshine Mining Company, a corporation.

(b) 116,666 $\frac{2}{3}$ shares of the capital stock of the Riverside Copper Mining Company, Ltd., a corporation.

(c) 100,000 shares of the capital stock of the Teddy Mining and Milling Company, Ltd., a corporation.

(d) 10,400 shares of the capital stock of the Little North Fork Copper Mining and Milling Company, Ltd., a corporation.

The undersigned hereby acknowledges receipt from John Pelkes as executor of the Estate of Amelia Pelkes, deceased of her full distributive share of said estate to which she has been, or may be entitled by virtue of the Decree of Distribution entered in said estate upon the 9th day of August, 1923."

On May 17, 1935, she filed herein two other papers, one bearing date April 22, 1935, and the other May 2, 1935. Those papers (omitting titles, dates, signatures and verification) read as follows:

"The undersigned hereby acknowledges receipt from John Pelkes as executor of the Estate of Amelia Pelkes, deceased, of her full distributive share of said estate to which she has, is or may be entitled by virtue of the Decree of Distribution entered in said estate upon the 9th day of August, 1923."

"Received of John Pelkes as executor of the Estate of Amelia Pelkes, deceased, in accordance with the terms of [fol. 647] decree of distribution entered in said estate on

the 9th day of August, 1923, and undivided one-fourth interest in and to the following described property:

East 132 feet Lots 1 and 2, Block 7 of Stratton's Addition to Spokane, Washington, appraised value	\$2,750.00
Lot 4 in Bloc- 56 Muzzy's Addition to Spokane, Washington, unpaid balance on sale contract	1,640.00
L. O. O. F. Promissory note, described in inventory	1,000.00
T. R. Mason, promissory note, described in inventory	1,000.00
John Byrne and Wife mortgage, described in inventory	10,000.00
Bonds of Interstate Utilities Company, also called Interstate Telephone Company, bonds, 6,000 shares, of the appraised value of	5,100.00
Cash on hand	10,024.33"

None of the above papers is a true and correct receipt for Katherine Masons distributive share of the Amelia Pelkes estate as actually received by her. What she actually received through the agreement between her and John Pelkes, executor, is stated in previous findings especially findings 7 and 8. The receipts filed by her should be corrected to read as follows:

"Katherine Mason, a beneficiary under the will of Amelia Pelkes, deceased, which will was probated in and is now in process of administration by the Superior Court of the State of Washington for Spokane County, hereby acknowledges the receipt from John Pelkes executor of said will, of her full distributive share of the property of said estate; [fol. 648] the amount of such distributive share having been fixed by an agreement between herself and John Pelkes, as executor, whereby she agreed to, and did, receive in her sole and undivided right a certain mortgage of the value of \$10,000, bonds of the Interstate Utilities Company of the value of \$5,100 and note of T. R. Mason of the value of \$1,000 and John Pelkes, the only other beneficiary under the will of Amelia Pelkes, agreed to, and did, receive all other property, belonging to the estate of Amelia Pelkes in his sole and undivided right. This receipt is a release of all right, title or interest of Katherine Mason in and to all

other property of the estate of Amelia Pelkes, deceased, whether derived from the will of Amelia Pelkes, from the decree of distribution entered in the matter of her estate, or from the agreement between Katherine Mason and Pelk-s as executor whereby there was given to her the above described property in lieu of her undivided interest in all the property of the estate."

17. Shortly after Katherine Mason had filed herein the petitions for the removal of John Pelkes as executor hereinbefore referred to the State of Washington, by William H. Pemberton, Supervisor of the Inheritance Tax and Escheat Division thereof, also filed a petition in this cause in which, reiterating the charges of embezzlement and fraud made by her he joined in her prayer for the removal of Pelkes as executor and the appointment of a suitable person as administrator c. t. a. to the end that the amount of the additional inheritance tax due on account of the allegedly concealed property of the estate might be ascertained and order paid. It having been shown to the Supervisor [fol. 649] that nothing was omitted from inventory and administration but the shares of mining companies above described, and the reason why those shares were omitted, the Supervisor has agreed with the executor on a value of the shares as of 1922-23, and the amount of additional tax that ought to be paid on account of them. That amount has been paid, the Supervisor's receipt therefore has been filed, and he has stipulated for a dismissal of his petition. I therefore find that all inheritance taxes due to the State of Washington from the estate of Amelia Pelkes has been paid.

18. From the time of the probate of the will of Amelia Pelkes and the appointment of John Pelkes as executor thereof to the present time, this court has possessed exclusive jurisdiction over her estate and the administration thereof. Katherine Mason personally has been within the jurisdiction of this court for all purposes connected with the distribution of the property of the estate of Amelia Pelkes, and the closing of the estate and discharge of the executor, from the time she presented to it her petitions for the removal of John Pelkes as executor and the appointment of an administrator c. t. a. All notices of hearings and proceedings served upon her since that time have been regular and sufficient to maintain jurisdiction over her

person for the purpose of the findings and adjudication now made.

Upon the foregoing findings and the entire record in this cause it is ordered, adjudged and decreed as follows:

I. Under the laws of the State of Washington, it was competent for John Pelkes, as executor, and Katherine [fol. 650] Mason, they being the sole beneficiaries under the will of Amelia Pelkes, to agree upon a settlement of the estate and a partition and distribution of the property of the estate, albeit in so doing they departed from the provisions of the will and the terms of the decree of distribution. Such agreement was subject to examination and approval or rejection by this court on petition of either party. My examination of the agreement (more fully described in findings 7 and 8) having convinced me that the agreement between Pelkes and Mason was in all respects fair and equitable so far as concerns Mason, and Pelkes not having complained thereof, it is in all respects approved and is adopted as a settlement, partition and distribution originally made under the approval and order of this court, and effect shall be given to it as though it were embodied in the decree of distribution of this court.

II. None of the receipts filed by Katherine Mason is correct, and all of them are disapproved and declared insufficient. She is ordered to file herein instantler a receipt reading as follows:

"Katherine Mason, a beneficiary under the will of Amelia Pelkes, deceased, which will was probated in and is now in process of administration by the Superior Court of the State of Washington for Spokane County, hereby acknowledges the receipt from John Pelkes, executor of said will of her full distributive share of the property of said estate; the amount of such distributive share having been fixed by an agreement between herself and John Pelkes, as executor, whereby she agreed to, and did, receive in her sole and un-[fol. 651] divided right a certain mortgage of the value of \$10,000 bonds of the Interstate Utilities Company of the value of \$5,100, and note of T. R. Mason of the value of \$1,000, and John Pelkes, the only other beneficiary under the will of Amelia Pelkes, agreed to, and did, receive all other property belonging to the estate of Amelia Pelkes in

his sole and undivided right. This receipt is a release of all right, title or interest of Katherine Mason in and to all other property of the estate of Amelia Pelkes, deceased, whether derived from the will of Amelia Pelkes, from the decree of distribution entered in the matter of her estate or from the agreement between Katherine Mason and Pelkes as executor whereby there was given to her the above described property in lieu of her undivided interest in all the property of the estate."

In the event of her failure to comply, this order shall stand in lieu of a receipt in those terms filed by her. It is found correct, and shall have the same effect as a receipt signed by her and filed herein and approved by me.

III. All claims and charges against and upon the estate of Amelia Pelkes have been fully paid and discharged, and full distribution of the property of the estate has been made to the beneficiaries entitled thereto.

IV. The estate of Amelia Pelkes is adjudged to have been fully administered upon and is closed, and John Pelkes is discharged as executor thereof. This subject to the note at the foot hereof.

Dated May 31, 1935.

[fol. 652]

Joseph B. Lindsley, Judge.

(W. G. Graves.)

NOTE.—During the progress of the hearings upon Katharine Mason's petition to remove John Pelkes as executor and appoint an administrator c. t. a., an order was made for her to appear in this court and give her deposition. She asserted physical disability as a reason for not obeying the order, and at the request of her counsel, Dr. John T. Bird was by this court sent to Kellogg, Idaho, her place of residence, to examine her and report to the court whether she was able to come to Spokane and give her deposition. He went, made the examination, and filed with the court a comprehensive report on her condition. His fees and charges for making the report and examination have not been paid. Also, it was announced by this court that Katharine Mason's petitions to remove Pelkes as executor and for the appointment of an administrator c. t. a. would not be granted except on condition that she pay the costs and

expenses incurred in defending against the petitions, including not only the executor's statutory costs but his costs taxed as between solicitor and client. Jurisdiction over this cause is reserved for the purpose of such proceedings, orders and judgments as may be necessary or proper in respect of the matters mentioned.

Joseph B. Lindsley, Judge.

(W. G. Graves.)

Presented by Will G. Graves.

Filed May 31, 1935. Frank C. Nash, Clerk.

[fol. 653] Also included in said transcript, exhibit No. 22, was plaintiffs exhibit No. 6, Order of solvency, entered in the Superior Court of the State of Washington, in and for the County of Spokane, August 8, 1922, in the matter of the estate of Amelia Pelkes, deceased which order is as follows, to-wit:

EXHIBIT No. 6

ORDER OF SOLVENCY

"This cause coming on regularly for hearing on motion of John Pelkes, executor, of the last will and testament of Amelia Pelkes, deceased and of her estate, for an Order of Solvency of said estate, and it appearing to the Court from the inventory on file herein and the affidavit of John Pelkes, and the records and files, herein, that said estate is of the reasonable value of \$27,350.00 and that it is wholly free and clear of all encumbrances, excepting that there are unpaid claims and liens against said estate in the sum of approximately \$895.00.

It is therefore ordered and decreed, that said estate is solvent and is entitled to be closed under the terms of the [fols. 654-662] will of the late Amelia Pelkes as a non-intervention will without the further interference or intervention of this court and it is further ordered that said executor shall pay said claims and expenses of administration and distribute said property, as provided by the terms of said will without further intervention of said court.

Done in open court this 8th day of August 1922.

Bruce Blake.

Filed Aug. 8, 1922, John Gifford Clerk, E. L. Perkins Deputy."

[fol. 663] Mr. Graves offered exhibit No. 26, in evidence on behalf of defendants Treinies and Seattle First National Bank. The said exhibit was admitted. It was the opening brief for the appellants Pelkes and Treinies in the Supreme Court of the State of Idaho. The assignments of error contained in said brief are as follows:

EXHIBIT No. 26

ASSIGNMENTS OF ERROR (Exhibit 26)

The Trial Court erred:

I. In overruling these appellants' demurrer to the complaint.

II. In not dismissing the action at the conclusion of the evidence for the reasons:

(1) Because the evidence established that plaintiffs had not title to or litigable interest in the shares of stock in controversy at the time this action was begun, and that they never acquired any such title or interest, and had no such title or interest at the time of the trial of this case and the entry of the decree therein.

(2) Because the evidence showed that the plaintiff Katherine Mason, upon whose title or claim of interest the plaintiffs' cause of action depends, was guilty of assuming inconsistent positions in the course of a series of suits respecting her title to or interest in the shares of stock in [fol. 664] controversy; taking one position in the probate proceeding in the Superior Court for Spokane County, Washington and an utterly inconsistent position in this action.

(3) Because the proof failed to establish the cause of action pleaded by plaintiffs, and the decree appealed from was entered upon a theory entirely foreign to the issues presented by the pleadings. That is to say, the plaintiffs by pleading and proof claimed title by virtue of an agreement between Katherine Mason and John Pelkes. The trial court held that no such agreement was proved, but entered judgment in plaintiff's favor upon the theory that Katherine Mason was entitled to the shares awarded her under the will of Amelia Pelkes and the decree of distribution of the Superior Court for Spokane County.

(4) Because the evidence showed that the trial court had not, and this court has not, jurisdiction over the subject matter of this action, the shares of stock in controversy. More particularly, the evidence showed that the Superior Court of the State of Washington for Spokane County had possession of and exclusive jurisdiction over the shares of stock which are the subject matter of this action at the time that this action was begun, and that such possession and jurisdiction continued until the rendition of a final judgment by the Court adjudging that the plaintiff Katherine Mason had no title to or interest in the stock, but that the same was the property of the defendant, John Pelkes. By reason of such possession, jurisdiction and adjudication the trial by Katherine Mason to recover such stock from John Pelkes or to entertain any action or render any judgment which was contrary to or in conflict with the adjudication of the said Superior Court. In that behalf, [fol. 665] these appellants say that the findings and decree of the trial court denied to the findings and judgment of the Superior Court of the State of Washington, for Spokane County, the full faith and credit to which those proceedings were entitled under Article IV Sec. 1 of the Constitution of the United States and Sec. 687 of Title 28 U. S. C. A.

III. In making the following findings of fact and conclusions of law:

(1) In finding that the whole tangible and ponderable substance of the Sunshine Mining Company is in the State of Idaho, (Finding III, F. 1849). There is no evidence to sustain that finding.

(2) In finding that in the probate proceeding in the Superior Court for Spokane County, the Amelia Pelkes estate was completely probated on or before August 9, 1923, and that on that date a decree of distribution was entered which distributed all the property of the estate including that not known or described, to the sole legatees under the will (Finding VII, F. 1853). The evidence shows that administration of the Amelia Pelkes estate was not completed until May 31, 1935, and that the judgment rendered on that date completed the distribution of the property of the estate.

(3) In finding that after the entry of the 1923 decree of distribution in the Amelia Pelkes estate, John Pelkes de-

livered into the possession and control of himself and Katherine Mason, as the sole heirs and distributees of the estate, or otherwise, manual possession of all the chattels belonging to the estate, and that delivery was made in performance of the terms of the decree of distribution (Finding VIII, ff. 1854-1855). The evidence shows that only a portion of the personal property of the estate was delivered to Katherine Mason, and that John Pelkes at all times [fol. 666] retained possession of the shares of stock in controversy.

(4) In making finding of fact numbered IX (f. 1856).

(5) In making so much of finding numbered X as begins with the words "That as to the mining stocks the distributees then and there agreed that the legal title thereof" (F. 1856) and ending with the words "including the mining stocks" in f. 1858.

(6) In making all of finding numbered XI (ff. 1860-1861), except the words "That the stock of the Sunshine Mining Company began to acquire value about the year 1927 and that small dividends began to be paid thereon."

(7) In making finding numbered XII (ff. 1861-1862) and the whole thereof. There is no evidence to sustain the finding.

(8) In making finding numbered XIII (ff. 1862-1863) and the whole thereof, except as much as finds that the defendant John Pelkes transferred 12,000 shares of stock to defendant Thinnies.

(9) In making so much of finding numbered XVI (ff. 1867-1869) as finds that the stock transferred by the defendant Pelkes to the defendant Treinies was stock belonging to Katherine Mason, that such transfer was made in fraud of Katherine Mason's rights, and that Pelkes had no title to such stock.

(10) In making so much of finding numbered XVII (ff. 1869-1873) as finds that Katherine Mason acted under a mistake of law and fact in filing the petition in the Superior Court of the State of Washington for Spokane County therein referred to, and as finds that in the proceeding initiated by Katherine Mason's petition, the defendant Pelkes alleged and submitted for adjudication to the District [fol. 667] Court of the First Judicial District of the State

of Idaho, for Shoshone County the self same controversy which by his pleadings in the Superior Court for Spokane County he had submitted for adjudication to that court.

(11) In making so much of finding numbered XIX (ff. 1874-1876) as finds either expressly or by implications that the plaintiff T. R. Mason secured a valid restraining order in respect to the subject matter stated. The evidence shows that the so-called proceedings by Mason was wholly nugatory and void.

(12) In making so much of finding numbered XX (ff. 1876-1878) as finds that the proceedings by the defendant Pelkes in the Superior Court for Spokane County was in violation of any restraining order issued by the District Court for Shoshone County, and as finds that the proceedings taken in that Court were in the absence of the plaintiff Katherine Mason. The restraining order referred to was void, and Katherine Mason was constructively present, and the Superior Court for Spokane County had jurisdiction over her person in the proceedings referred to.

(13) In making finding numbered XXI (f. 1879), and the whole thereof. The finding is contrary to the evidence.

(14) In making finding numbered XXII (ff. 1880-1882), and the whole thereof. There is no evidence to support this finding.

(15) In making finding numbered XXIII (ff. 1882-1885) and the whole thereof. The finding is contrary to the undisputed evidence.

(16) In making finding numbered XXIV (ff. 1885-1888) and the whole thereof. The finding is in the teeth of undisputed evidence.

(17) In making finding numbered XXV (f. 1888) and [fol. 668] the whole thereof. The finding is contrary to the evidence.

(18) In making finding numbered XXVI (f. 1889), and the whole thereof. The finding is contrary to the facts and the law of the case.

(19) In making finding numbered XXVII (f. 1890) and the whole thereof. This finding is contrary to the facts and the law of the case.

(20) In making finding numbered XXVIII (f. 1891) and the whole thereof, the finding is contrary to the facts and law of the case.

(21) In making each and all of the conclusions of law, appearing at ff. 1893-1899. These conclusions are contrary to the law and are based upon mistaken assumption of fact.

IV. In entering the decree in this cause (ff. 1900-1908). Such decree is in its every part in conflict with the law and the undisputed facts in the case.

V. The findings and judgment of the Superior Court of the State of Washington for Spokane County made and rendered by that Court on May 31, 1935, in cause No. 15496 of the files of that Court and entitled; "In the Matter of the Estate of Amelia Pelkes, deceased," constitute a final adjudication of the respective rights of Katherine Mason, under whom plaintiffs claim and of John Pelkes in and to the shares of stock in controversy in this action, and which constitute the subject matter of the action. Such findings and judgment were judicial proceedings in a court of competent jurisdiction of the State of Washington and under Article IV Sec. 1, of the Constitution of the United States and Sec. 687, Title 28 U. S. C. A. were entitled to full faith and credit in the Courts of Idaho. If such faith and credit had been given them this action must [fols. 669-674] have been dismissed at the conclusion of the evidence. Entertaining the action and entering a decree in favor of plaintiffs and against these appellants was a denial of the appellants' rights under the constitution and laws of the United States. These appellants claim the benefit of the constitutional and Statutory provisions above referred to and demand that in virtue of them this action be dismissed.

VI. Under the Circumstances disclosed by the record the Superior Court of the State of Washington for Spokane County had exclusive possession of and jurisdiction over the shares of stock which constitute the subject of this action, and the trial court did not have jurisdiction to entertain this action nor to enter a decree conflicting with the judgment of the said Superior Court. Its assumption of power to do so was the denial of a right accruing to

these appellants under the Constitution and laws of the United States, the protection of which these appellants claim.

[fol. 675] ORDER APPROVING NARRATIVE STATEMENT OF EVIDENCE

The foregoing narrative statement of the evidence is hereby allowed and approved and contains all of the material facts, matters and things occurring at the trial of said cause and essential to the decision of the questions presented by the appeal in this cause; that the same is hereby ordered filed as a statement of the evidence to be included in the record of appeal in the above styled case as provided in paragraph (b) of Equity Rule 75.

Dated December 4th, 1937.

Charles C. Cavanah, United States District Judge.

[fol. 676] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 18, 1937

This cause having come on regularly for trial before the Honorable Charles C. Cavanah sitting in equity, the plaintiff being represented by its solicitors, Messrs. Rigg, Brown and Halverson, J. E. Gyde, James E. Gyde, Jr., and the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern branch), administrator with the will annexed of the estate of John Pelkes deceased, [fol. 677] having appeared by their solicitors of record, Messrs. Graves, Kizer and Graves and H. J. Hull, and the defendants Katherine Mason and T. R. Mason, Lester S. Harrison and Grace G. Harrison, Walter H. Hanson and Edna B. Hanson, and F. C. Keane having appeared by their solicitors of record, Lester S. Harrison, Richard S. Munter, Cox & Ware, Walter H. Hanson and F. C. Keane, and the defendant A. W. Hawkins, as the duly elected, qualified and acting judge of the Superior Court of the State of Washington, in and for Yakima County, having appeared personally and having made his return to the bill of inter-

pleader by the above-named plaintiff, and the defendant J. C. Cheney, as receiver, having also appeared in said cause, and it appearing that all of the defendants above named were regularly served with subpoena ad respondem, and the parties heretofore having introduced evidence, and the court having heard the testimony and having taken the matter under advisement, and having heretofore and on the 29th day of May, 1937, rendered its opinion herein, and the court being fully advised in the premises now makes the following findings of fact:

I

That at all times herein mentioned the Sunshine Mining Company has been and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has paid all license fees as required by the laws of said state. That at all times herein mentioned, said Sunshine Mining Company has been and now is authorized to do business in the state of Idaho and has complied with all laws of the State of Idaho relating to foreign corporations doing business within said state, and has paid all fees as required by the laws of said state.

[fol. 678]

II

That at all times herein mentioned defendant Evelyn H. Treinies has been and now is a citizen of the State of Washington and resides in the City of Spokane, County of Spokane, State of Washington.

III

That at all times herein mentioned defendant Seattle-First National Bank (Spokane and Eastern Branch) is a corporation organized under the national banking laws of the United States, and is the duly appointed, qualified and acting administrator with the will annexed in the matter of the estate of John Pelkes, deceased.

IV

That at all times herein mentioned the defendants Katherine Mason and T. R. Mason have been and now are wife and husband, respectively, and are citizens of the State of Idaho, and reside in the City of Kellogg, County of Shoshone, State of Idaho.

V

That at all times herein mentioned defendants Lester S. Harrison and Grace G. Harrison were and now are husband and wife and are citizens of the State of Idaho and reside in the City of Kellogg, County of Shoshone, State of Idaho.

VI

That at all times herein mentioned defendants Walter H. Hanson and Edna B. Hanson have been and now are husband and wife and are citizens of the State of Idaho and reside in the City of Wallace, County of Shoshone, State of Idaho.

VII

That at all times herein mentioned defendant F. C. Keane has been and now is a citizen of the State of Idaho and resides [fol. 679] in the City of Wallace, County of Shoshone, State of Idaho.

VIII

That at all times herein mentioned defendant A. W. Hawkins has been and now is the duly elected, qualified and acting judge of the Superior Court of the State of Washington, in and for Yakima County. That at all times herein mentioned said defendant has been and now is a citizen of the State of Washington and a resident of the City of Yakima, County of Yakima, State of Washington.

IX

That at all times herein mentioned defendant J. C. Cheney has been and now is the duly appointed, qualified and acting temporary receiver in the case of Seattle-First National Bank (Spokane and Eastern branch), administrator with the will annexed of the Estate of John Pelkes, deceased, and Evelyn H. Treinies, plaintiffs vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson, F. C. Keane and Sunshine Mining Company, defendants, in the Superior Court of the State of Washington, in and for Yakima County, being cause No. 9435 of the records and files of the clerk of said court. That at all times herein mentioned said J. C. Cheney has been and now is a citizen of the State of Washington and a resident of the City of Yakima, County of Yakima, State of Washington.

X

That the amount in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs, and that the above-entitled court has jurisdiction to entertain this controversy.

[fol. 680]

XI

That heretofore and on or about the 4th day of August, 1934, the defendants herein, Katherine Mason and T. R. Mason, as plaintiffs, instituted suit in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, against John Pelkes, Frances Thinnies and Pierre Thinnies, her husband, Evelyn H. Treinies, and Sunshine Mining Company, a corporation, being cause No. 7460 of the records and files of the office of the clerk of said court in the City of Wallace, State of Idaho. That in said suit said plaintiffs alleged that said John Pelkes, now deceased, had acquired 30,598 shares of stock in the Sunshine Mining Company; that said John Pelkes had sold and disposed of all of said stock except 16,000 shares thereof, which he had caused to be issued to the defendant herein, Evelyn H. Treinies. That said plaintiff Katherine Mason further alleged that of said 16,000 shares of stock standing in the name of Evelyn H. Treinies she was the owner of 15,299 shares of said stock, and that said Evelyn H. Treinies acquired said stock with knowledge of the rights of said plaintiff. That thereafter all of said defendants in said Idaho District Court action appeared generally and a trial and such proceedings were had thereon which resulted in a decree entered on September 30, 1935, in said Idaho District Court adjudging and decreeing the plaintiff Katherine Mason to be the owner of 7649 shares of said capital stock, and the defendant Evelyn H. Treinies to be the owner of said balance of said 16,000 shares of stock. That said Frances and Pierre Thinnies were dismissed from said proceeding prior to the decree entered therein. That said decree entered in said Idaho [fol. 681] action further provided that said Evelyn H. Treinies should surrender her said certificate of stock for cancellation, and that the Sunshine Mining Company, upon the surrender of said certificate of stock should issue out to said Katherine Mason 7649 shares of said stock and further issue to Evelyn H. Treinies 8351 shares of said stock, and pay the dividends accrued to each of said parties on said

stock according to their ownership as adjudged by said decree. That said decree further provided that in the event said Evelyn H. Treinies should fail or refuse to surrender her said certificate within ten (10) days after the date of entry of said decree, the said Sunshine Mining Company should in that event cancel the said certificate of stock standing in the name of Evelyn H. Treinies and issue to the said Katherine Mason a certificate of stock for 7649 shares of said stock and pay to her the dividends accrued thereon and should issue to said Evelyn H. Treinies the remaining of said 16,000 shares upon her complying with said decree.

XII

That thereafter the defendants, John Pelkes, now deceased, and Evelyn H. Treinies and the Sunshine Mining Company appealed to the Supreme Court of the State of Idaho and plaintiffs Katherine Mason and T. R. Mason cross-appealed. That said John Pelkes and Evelyn H. Treinies failed to comply with the terms of said decree and surrender said certificate of stock, and the said Sunshine Mining Company, as a part of said appeal proceedings and for the purpose of superseding and staying said decree, cancelled the said certificate of stock standing in the name of Evelyn H. Treinies and reissued in lieu thereof said stock as follows: 7649 shares in the name of Katherine Mason, and 8351 shares in the name of Evelyn H. Treinies, [fol. 682] and deposited all of said stock with the Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone.

XIII

That thereafter such proceedings were had that on or about the 23rd day of July, 1936, the appeals of said parties were determined by the Supreme Court of the State of Idaho. That the decision of said supreme court modified the decision of the trial court and found Katherine Mason to be the owner of 15,299 shares of stock of the Sunshine Mining Company, together with the dividends accrued and accruing thereon, and ordered the clerk of said court to properly indorse said certificates and deliver the same to the said Katherine Mason. The decision further ordered said Sunshine Mining Company to recognize the ownership of said Katherine Mason in said 15,299 shares of stock.

XIV

That pursuant to said decision in the Idaho Supreme Court and pursuant to the judgment and decree entered in accordance therewith, the Sunshine Mining Company did on the 20th day of August, 1936, cause to be issued to Katherine Mason 15,299 shares of its stock, which were in lieu of said certificates deposited with the clerk of said district court of Idaho, and likewise said Sunshine Mining Company did on said date pay to said Katherine Mason dividends accrued and accruing thereon in the sum of \$42,225.24 and that heretofore said sum of \$42,225.24 has heretofore been deposited in the registry of the above-entitled court by the said defendant Katherine Mason and that at the same time the said Katherine Mason deposited in the registry of [fol. 683] the above-entitled court the certificates for 15,299 shares of the capital stock of the plaintiff, Sunshine Mining Company.

XV

That thereafter said John Pelkes and Evelyn H. Treinies made application to the Supreme Court of the United States for a writ of certiorari to review the decision of the said Idaho Supreme Court and, as a part thereof, obtain an injunction pending appeal enjoining and restraining said Katherine Mason from transferring any of said certificates of stock or in any way disposing of said sum of money paid to them as dividends. That thereafter the said Supreme Court of the United States denied the application of said John Pelkes and Evelyn H. Treinies for a writ of certiorari and said defendant Katherine Mason was in possession of said 15,299 shares of stock together with the dividends paid thereon by the Sunshine Mining Company, totaling \$42,225.24, said amount being the dividends accrued on said 15,299 shares of stock from the 4th day of August, 1934, to the 20th day of August, 1936, until surrendered into the registry of this court in this action on May 21, 1937.

XVI

That while said case was pending in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and before trial of said cause had been had, and on or about the 14th day of December, 1934, the defendant herein, Katherine Mason, filed her petition in the matter of the Estate of Amelia Pelkes, deceased, in the

Superior Court of the State of Washington, in and for Spokane County, being Probate Cause No. 15496 of the records [fol. 684] and files of the clerk of said court. That in said petition said Katherine Mason prayed for certain relief. That shortly thereafter said John Pelkes, now deceased, filed his petition in said probate cause. That subsequently thereafter said Katherine Mason moved to dismiss her said petition, but such proceedings were had in said probate cause upon an independent petition of John Pelkes as executor as resulted in a decree being entered in said probate cause on the 31st day of May, 1935, wherein it was adjudicated that the said John Pelkes was the owner of said 30,598 shares of Sunshine Mining Company stock that had formerly stood in his name on the books and records of said Sunshine Mining Company. That following the said 31st day of May, 1935, said John Pelkes presented the decree in said probate proceedings as a defense to the action then pending against him in said District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and said defense, together with other defenses submitted in behalf of John Pelkes, now deceased, was duly considered by said trial court and Supreme Court of the State of Idaho.

XVII

That while the appeal of said Idaho case was pending in the Supreme Court of the State of Idaho and on or about the 12th day of August, 1936, John Pelkes, now deceased, and Evelyn H. Treinies, as plaintiffs, instituted in the Superior Court of the State of Washington, in and for Spokane County, suit against Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson, F. C. Keane and Sunshine Mining Company, wherein said plaintiffs alleged that they were the owners of all of said 16,000 shares of stock in the Sunshine Mining Company and further alleged that the district court of the [fol. 685] State of Idaho had no jurisdiction over them, and that they were not bound by the decree entered by said District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and further alleged that the defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson and F. C. Keane claimed to have some interest in said stock, and prayed that title of said plaintiffs

to said 16,000 shares of stock be quieted in the said plaintiffs, and that the Sunshine Mining Company be compelled to recognize the ownership of said John Pelkes and Evelyn H. Treinies in and to all of said 16,000 shares of stock. That while said cause was pending and on the 16th day of October, 1936, said John Pelkes died, and said Seattle-First National Bank (Spokane and Eastern branch) was appointed as administrator with the will annexed of the estate of John Pelkes, deceased, as hereinbefore alleged, and substituted as a party plaintiff in said cause.

XVIII

That on or about the 11th day of January, 1937, the said Supreme Court of the United States denied the application for writ of certiorari to review the decision of the Idaho Supreme Court, and on said date an order was entered without notice to any of the defendants named in said case pending in the Superior Court of the State of Washington, in and for Spokane County, appointing J. C. Cheney as temporary receiver to take into his possession as such the undivided interest in the assets of the Sunshine Mining Company of which the cancelled certificate of stock held by Evelyn H. Treinies is alleged to be the indicia of ownership. That said J. C. Cheney filed his oath and bond and [fol. 686] qualified as such receiver, and has attempted and is attempting to take into his possession an undivided interest in the assets of the Sunshine Mining Company as alleged to be evidenced by said cancelled certificate of stock of the Sunshine Mining Company standing in the name of Evelyn H. Treinies. That upon the appointment and qualification of said J. C. Cheney as temporary receiver, said Sunshine Mining Company gave notice that it would not recognize the said ownership of said Katherine Mason in and to said 16,000 shares of stock during the pendency of the litigation and until such time as the final adjudication of all the parties named as defendants in this action is made in and to said stock and the dividends accrued and accruing thereon.

XIV

That thereafter and on or about the 19th day of January, 1937, said Seattle-First National Bank (Spokane and Eastern branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies

filed in said case in the Superior Court of the State of Washington, in and for Spokane County, being cause No. 98,427, their amended complaint, and thereafter such proceedings were had that said cause was transferred from the Superior Court of the State of Washington, in and for Spokane County, to the Superior Court of the State of Washington, in and for Yakima County. That motions and demurrers have been made by the defendant, Sunshine Mining Company, and the defendants Walter H. Hanson and Edna B. Hanson to said amended complaint, and the matters argued, and said motions and demurrers were under advisement by the said Honorable A. W. Hawkins, Judge of the Superior [fol. 687] Court of the State of Washington, in and for Yakima County, at the time of the commencement of this action.

XX

That the principal place of business of the Sunshine Mining Company is located in the County of Yakima, State of Washington, and the said Sunshine Mining Company is subject to the jurisdiction of the Superior Court of the State of Washington, in and for Yakima County, in said cause now pending and is likewise subject to the jurisdiction of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, said Sunshine Mining Company being a foreign corporation doing business in the State of Idaho as hereinbefore alleged and likewise all of its mining properties being located within said Shoshone County, Idaho.

XXI

That the Sunshine Mining Company does not now claim and has not at any time herein mentioned claimed any interest in said 16,000 shares of capital stock or the dividends accrued or accruing thereon, and is disinterested as to what party or parties shall be adjudged to be the owner or owners of said stock and the dividends accrued or accruing thereon. That the Sunshine Mining Company now has in its possession as accrued dividends on said 15,299 shares of stock, being the dividends payable on said 15,299 shares of stock on September 30, 1936, at the rate of 50¢ per share, and December 15, 1936, at the rate of 75¢ per share, the sum of \$19,123.75, in which amount the Sunshine Mining Company has no interest and which has been paid into the registry of

the above-entitled court before the institution of this suit, and that plaintiff, Sunshine Mining Company, has no interest [fol. 688] in the additional sum of \$11,473.25, which is dividends which have accrued on said 15,299 shares of stock and which said plaintiff, Sunshine Mining Company, has heretofore paid into the registry of the above-entitled court and during the time the above-entitled action has been pending in the above-entitled court.

XXII

That some years ago John Pelkes and Amelia Goetz, a widow with two children, married; one of the children died in infancy and the other is Katherine Mason. In 1922 Amelia Pelkes died testate in Spokane, Washington. The property of the couple was community property and by will Amelia Pelkes gave her one-half of the community property to be disposed of in equal shares to her husband, John Pelkes, and her daughter, Katherine Mason. The will of Amelia Pelkes was probated in 1922 in the Superior Court for Spokane County, Washington, sitting in probate. The laws of the State of Washington require a statement of the property be accompanied with the petition for letters of administration. These shares of stock were not included in the inventory and appraisal of the property in that estate, nor specifically mentioned in the final account or decree of distribution, although the decree of distribution contains the general clause "any other property not known or described, which may belong to said estate.

XXIII

That after the decree of distribution Pelkes and Mrs. Mason made an equal division of the property affected, and as to the stock here involved they agreed that Pelkes was to hold title to the 15,299 shares for Mrs. Mason in trust for her. Pelkes in 1933 transferred 16,000 shares of the stock, [fol. 689] which included the 15,299 shares to Treinies. After repudiating the trust agreement, Mrs. Mason instituted the suit referred to against him on August 4, 1934, in the state district court of Idaho to establish and enforce the trust.

XXIV

The court finds that the Superior Court of Spokane County, Washington, sitting in probate, on August 9, 1923,

entered a decree of distribution in the estate of Amelia Pelkes wherein her will of date September 25, 1918, was probated, distributing all of the property of the estate, including that not known or described, to the sole legatees under the will, who were John Pelkes, her husband, and Katherine Mason, a daughter by a former marriage. The mining stock here in question was not specifically described in that decree. In carrying out the terms of the will, the decree of distribution decreed, "that the residue of said estate of Amelia Pelkes, hereinafter particularly described and now remaining in the hands of said executor, and any other property not now known or described, which may belong to said estate, or in which said estate may have any interest, be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit: John Pelkes, husband, Spokane, Washington, an undivided one-half interest thereof; Katherine Mason, daughter, Kellogg, Idaho, an undivided one-half interest.

"By this decree said John Pelkes becomes the owner of an undivided three-fourths interest in the property described in the inventories on file herein, or the proceeds thereof, and the said Katherine Mason becomes owner of the remaining one-fourth interest undivided, in said property, the said John Pelkes being the owner of a community or undivided one-half interest of said property at the time of the death of his wife, the said Amelia Pelkes."

[fol. 690]

XXV

The court finds that all of the property in which Amelia Pelkes had interest at the time of her will was executed and at the time of her death was community property in which she had an undivided one-half interest and her husband, John Pelkes, an undivided one-half interest, under the laws of both the states of Washington and Idaho. John Pelkes was, under the will and order of the Superior Court of Washington, appointed executor of the estate without bond, as provided in the will, to fully execute and distribute the estate without any application to any court for leave or confirmation and without any intervention of any court unless the same is expressly required by law. The next step taken in the Superior Court of Washington was December 19, 1934, some eleven years after the decree of distribution and subsequent to the commencement of the

Idaho District Court action on August 4, 1934, in the Idaho court, when Mrs. Mason filed a petition in the Superior Court of Washington wherein she alleged among other things that certain property belonging to the estate, including 30,598 shares of capital stock of the Sunshine Mining Company, had not been inventoried or probated, and she further alleged that Pelkes as executor had wasted or embezzled the property and had committed fraud upon the estate and that he was incompetent to act and requested that he show cause why he should not be removed as executor and his letters of administration revoked. Later she sought to dismiss her petition. Pelkes replied to the petition and alleged that he was the owner of the stock. Thereafter on May 31, 1935, the Superior Court for Spokane County, Washington, entered a judgment now relied upon by Evelyn Treinies and the administrator of the estate of [fol. 691] John Pelkes, in which it ordered that Mrs. Mason had no interest in the shares of stock by reason of an agreement between her and John Pelkes, and adjudged the estate of Amelia Pelkes to have been fully administered upon and closed.

XXVI

The court finds that the 701 shares of stock of plaintiff, Sunshine Mining Company, a certificate for which is now in the hands of the Sheriff of Shoshone County, State of Idaho, is subject to sale by the Sheriff of Shoshone County, State of Idaho, together with all dividends which have occurred thereon, for the purpose of satisfying the judgment of \$19,429.73 in favor of Masons, which said judgment was entered pursuant to the directions of the Supreme Court of the State of Idaho, and the defendants Katherine Mason and T. R. Mason are entitled to have said shares of stock sold by the Sheriff of Shoshone County, State of Idaho, and the proceeds applied to the payment and satisfaction of said judgment for \$19,429.73, with interest.

XXVII

The court finds that the reasonable costs and expenses of plaintiff, Sunshine Mining Company, herein incurred, including an attorney fee, is the sum of \$3,397.88, and that the same is a proper and just charge against the funds now in the registry of the above-entitled court.

From the foregoing facts the court draws the following conclusions of law:

I

That the plaintiff, Sunshine Mining Company, is disinterested as to the interests of the said defendants and each of [fol. 692] them as to the title of said 15,299 shares of stock and the dividends accrued and accruing thereon.

II

That the plaintiff herein has a right to maintain the above-entitled action and that in the event jurisdiction of said action so instituted by the above-named plaintiff was not entertained, it would result in a multiplicity of suits.

III

That the temporary restraining order and injunction pendente lite heretofore issued in the above-entitled cause were valid and were necessary to the exercise of this court's jurisdiction and that the plaintiff, Sunshine Mining Company, is without any plain, speedy or adequate remedy at law.

IV

That under the laws of Washington the Superior Court of Spokane County, sitting in probate, had jurisdiction and power to probate the estate of Amelia Pelkes under her will and render a decree of distribution of property then inventoried and unknown or undescribed property of which she may have been possessed, and when such decree was rendered, title was vested in the beneficiaries under the will. That the decree of distribution so made by the superior court was comprehensive and final and, in the absence of an appeal, cannot be collaterally attached, and that the executor, John Pelkes, pursuant to that decree, delivered the whole of the property of the estate to the beneficiaries and that the same passed out of the custody of the Superior Court of Spokane County, and that the jurisdiction of the Superior Court of Spokane County, sitting in probate, was [fol. 693] closed as to the shares of stock here involved after the heirs had made amicable division of their own property, no controversy then existing to which the jurisdiction of said superior court could attach.

V

That the decree of distribution made on August 9, 1923, was and has all the force, effect and finality of any other final judgment rendered by a superior court of the State of Washington.

VI

That the defendant Katherine Mason was not estopped by reason of having filed her petition in the Superior Court of the State of Washington, such doctrine of estoppel being governed by the laws of the forum and the Idaho rule being that no estoppel arises where no injury has been had.

VII

That the action instituted by Katherine Mason and T. R. Mason in the Idaho district court was one to enforce an oral trust growing out of the division of personal property that had been derived from a decree of distribution after it had been completely distributed, and that the cause of action was cognizable by a court of general equitable jurisdiction, and that the District Court of the First Judicial District of the State of Idaho entertained such jurisdiction. Pelkes and Treinies having appeared in the Idaho action, the Idaho court had jurisdiction over both parties and subject matter, and the decision of the highest court of the State of Idaho, and which decision was not disturbed by the Supreme Court of the United States, is final and conclusive upon this court, and that by a denial of [fol. 694] said petition for certiorari, the Supreme Court of the United States affirmed the judgment of the Supreme Court of the State of Idaho and the Supreme Court of Idaho having concluded when in considering the issue of fact as to the ownership of the shares of stock between the parties to be owned by Katherine Mason, its decision upon that issue of fact is conclusive upon which it is based and final and conclusive upon the parties in all said litigation between them.

VIII

That the shares of stock in plaintiff, Sunshine Mining Company, having been distributed, were no longer property of the estate, and the Superior Court of Spokane County, State of Washington, sitting in probate, did not have jurisdiction of said corporation or said shares of stock.

IX

That the effect of the judgment of the Supreme Court of the State of Idaho, and which judgment the Supreme Court of the United States refused to review, is a bar to the present proceeding insofar as it seeks to deprive Katherine Mason of the ownership of said 15,299 shares of said stock, together with the dividends accruing and accrued thereon.

X

That the defendant Katherine Mason is entitled to a decree of this court ordering, adjudging and decreeing that she is the owner of 15,299 shares of the capital stock of Sunshine Mining Company now in the registry of the above-entitled court, and is further entitled to a decree of this court ordering and directing the clerk of the above-entitled court to deliver to her said 15,299 shares of stock so held by the clerk.

[fol. 695]

XI

That the plaintiff, Sunshine Mining Company, is entitled to a decree of this court ordering, adjudging and decreeing that the certificate for 16,000 shares of the capital stock of Sunshine Mining Company heretofore deposited in the registry of the above-entitled court be delivered to plaintiff, Sunshine Mining Company, for cancellation, said plaintiff, Sunshine Mining Company, having heretofore issued certificates in lieu thereof and which certificates are now in the registry of the above-entitled court and in the hands of the Sheriff of Shoshone County, State of Idaho.

XII

The plaintiff, Sunshine Mining Company, is entitled to a decree of this court ordering, adjudging and decreeing that it do have and recover its costs and expenses herein incurred, which the court has found is the sum of \$3,397.88, to be paid to it out of the funds now in the registry of the above-entitled court.

XIII

The defendant Katherine Mason is entitled to a decree of this court ordering, adjudging and decreeing that she is the owner of the dividends which have accrued or are ac-

cruing on said 15,299 shares of stock, and which said dividends are now in the registry of the above-entitled court, after deducting therefrom the amount heretofore allowed plaintiff, Sunshine Mining Company, and the clerk of the above-entitled court is hereby ordered and directed to pay over said sum of money, which the court finds is \$69,425.36, [fol. 696] to the defendant Katherine Mason.

XIV

The defendant Katherine Mason is entitled to a decree of this court ordering and directing the clerk of the above-entitled court to pay to the Sheriff of Shoshone County, State of Idaho, the dividends which have accrued on said 701 shares of stock, and which said dividends are now in the hands of the clerk of the above-entitled court, and which amount to the sum of \$3,336.76.

XV

That the defendants Katherine Mason and T. R. Mason are entitled to a decree of this court ordering and directing the Sheriff of Shoshone County, State of Idaho, to proceed with the sale of the 701 shares of stock in the Sunshine Mining Company now held by said Sheriff of Shoshone County, pursuant to execution issued on the judgment for \$19,429.73, together with interest thereon, and plaintiff, Sunshine Mining Company, should be ordered to recognize the sale of said 701 shares of stock and to recognize the purchaser at said sale as the owner of said 701 shares of stock.

XVI

That the plaintiff, Sunshine Mining Company, and the defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson and F. C. Keane are entitled to a decree of this court permanently restraining the Seattle-First National Bank (Spokane and Eastern branch), administrator with the will annexed of the estate of John Pelkes, deceased, and the defendant Evelyn H. Treinies from proceeding with [fols. 697-722] said action pending in the Superior Court of the State of Washington, in and for the County of Yakima, entitled "Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, Deceased, and Evelyn H. Treinies,

Plaintiffs, v. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and Sunshine Mining Company, Defendants," and from in any manner prosecuting any actions on any of the purported matters or things therein sought to be or herein adjudicated, save and except that injunction shall not operate so as to deprive said above-named defendants or either of them from appealing from this decree.

XXVII

The defendants Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson, and F. C. Keane are entitled to a decree of this court ordering and directing that they recover their costs incurred in the defense of this action from the defendants Seattle-First National Bank (Spokane and Eastern branch), administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies, and hereby taxed in the sum of \$10,00, the defendants Masons and others having in open court waived their right to a recovery of the sum of money heretofore allowed by the above-entitled court to plaintiff, Sunshine Mining Company, for its costs and attorney fees allowed in said action.

Done in open court this 18th day of June, 1937.

Charles C. Cavanah, District Judge.

[fol. 723] IN UNITED STATES DISTRICT COURT

DECREE—Filed June 18, 1937

The court having heretofore made and entered herein its findings of fact and conclusions of law,

I

It is Hereby Ordered, Adjudged and Decreed and this does order, adjudge and decree that the defendant Katherine Mason is the owner of 15,299 shares of the capital stock of plaintiff, Sunshine Mining Company, now in the registry of the above-entitled court, and it is further ordered, adjudged and decreed and this does order, adjudge and decree the clerk of the above-entitled court deliver to

the defendant Katherine Mason said certificates for 15,299 shares of stock so held in the registry of the above-entitled court.

II

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the certificates for 16,000 shares of the capital stock of plaintiff, Sunshine Mining Company, and which stock is of record in the name of Evelyn H. Treinies, and which stock is deposited in the registry of the above-entitled court, be delivered by the clerk of said court to plaintiff, Sunshine Mining Company for cancellation.

[fol. 724]

III

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the plaintiff, Sunshine Mining Company, shall recognize the certificates for 15,299 shares of its capital stock and which said certificates have heretofore been issued to the defendant Katherine Mason.

IV

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the plaintiff, Sunshine Mining Company, do have and recover its costs and expenses herein incurred, taxed in the sum of \$3,397.88, which sum is to be paid by the clerk upon the entry of this decree out of funds now in the registry of the above-entitled court.

V

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the defendant Katherine Mason is the owner of dividends which have accrued and are accruing on said 15,299 shares of stock, and which said dividends accrued are now in the registry of the above-entitled court, after deducting therefrom the amount heretofore allowed plaintiff, Sunshine Mining Company, the balance thus remaining to be paid to Katherine Mason being \$69,425.36, and the clerk of the above-entitled court is hereby ordered and directed to pay said sum of money to the defendant Katherine Mason upon the entry of this decree.

VI

It is Further Ordered, Adjudged and Decreed and this does order and adjudge that the Sheriff of Shoshone County, State of Idaho, is entitled to have the dividends on the 701 shares of stock standing in the name of Evelyn H. Treinies on the books of said plaintiff company, paid into his hands for the purpose of satisfying the judgment heretofore made by the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, in an action entitled "Katherine Mason and T. R. Mason, Plaintiffs, vs. John Pelkes, et al., Defendants."

VII

It is Further Ordered, Adjudged and Decreed and this [fol. 725] does order and direct the Sheriff of Shoshone County, State of Idaho, to proceed with the sale of the 701 shares of stock in the Sunshine Mining Company, now held by Sheriff of Shoshone County, pursuant to execution issued out of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and which execution has for its purpose the satisfaction of a certain judgment for the sum of \$19,429.73, together with interest thereon.

VIII

It is Further Ordered, Adjudged and Decreed and this does order and direct the Sunshine Mining Company to recognize the purchaser at the sale of said 701 shares as the owner of said 701 shares of stock of said plaintiff, Sunshine Mining Company, and said Sunshine Mining Company is further ordered to recognize the certificate of sale made by the sheriff on said 701 shares of stock so sold or any part or portion thereof.

IX

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the above-named defendants, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and the defendant, Evelyn H. Treinies are hereby permanently restrained and enjoined from the further prosecution of said action entitled "In the

Superior Court of the State of Washington, in and for the County of Yakima; Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, Deceased, and Evelyn H. Treinies, Plaintiffs, vs. Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Jane Doe Hanson, F. C. Keane and Sunshine Mining Company, Defendants," and are further permanently enjoined and restrained from in any manner prosecuting any actions on any of the purported matters or things in said action sought to be adjudicated, or any matters or things here adjudicated in any court or courts anywhere, other than by appeal from this decree.

[fol. 726]

X

It is Further Ordered, Adjudged and Decreed and this does order, adjudge and decree that the above-named defendants, Katherine Mason, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson, and F. C. Keane, do have and recover their costs herein incurred and hereby taxed at the sum of \$10.00, the said defendants above named having waived their right to a recovery from defendants Seattle-First National Bank and Evelyn H. Treinies of the sum of money allowed the plaintiff, Sunshine Mining Company, for its costs and attorney fees allowed by the Court.

XI

It is Further Ordered, Adjudged and Decreed and this does order and adjudge that the bond filed by the above-named plaintiff for the purpose of securing the temporary restraining order and for injunction pendente lite heretofore issued in the above-entitled cause be, and the same is hereby exonerated.

Done in open court this 18th day of June, 1937.

Charles C. Cavanah, District Judge.

[fol. 727] IN UNITED STATES DISTRICT COURT

Nat U. Brown, Yakima, Washington; C. W. Halverson, Yakima, Washington; James E. Gyde, Wallace, Idaho, Attorneys for the Plaintiff.

Lester S. Harrison, Kellogg, Idaho; Cox & Ware, Lewiston, Idaho; Richard S. Munter, Spokane, Washington; Walter H. Hanson, Wallace, Idaho; F. C. Keane, Wallace, Idaho, Attorneys for defendants, Masons, Harrisons, Hansons and Keane.

Graves, Kizer & Graves, Spokane, Washington, Attorneys for defendants Treinies, Seattle First National Bank, (Spokane and Eastern Branch) and Hawkins.

OPINION—Filed May 29, 1937

CAVANAH, District Judge:

The Sunshine Mining Company brings this action in Interpleader under an Act of Congress as to the respective rights and ownership of the defendants to 15,299 shares of stock issued by it and the dividends accrued and accruing thereon, and that it be discharged from all liability, except [fol. 728] its obligation of recognizing the true owner. The controversy has a complicated history as to the efforts of the parties to have their interest in the stock determined, and the jurisdictions invoked, would make one wonder if there is any other Court remaining, known to American Jurisprudence in which the parties may insist for a decision.

The plaintiff is a corporation organized under the laws of the State of Washington, and authorized to do business in Idaho. A diversity of citizenship between it and the defendants Masons, Harrisons, Hansons and Keane, and the requisite jurisdictional amount exists. The defendant Cheney is the Receiver in the case of the Seattle First National Bank Administrator in the estate of John H. Pelkes and Evelyn H. Treinies, against the defendants Masons, Harrisons, Hansons and Keane, and the Sunshine Mining Company, pending in the State Superior Court of Washington.

About August 4, 1934, Masons instituted suit in the State District Court of Idaho, against John Pelkes, Francis Thinnies and Pierre Thinnies, Evelyn Treinies and the Sunshine Mining Company, in which the plaintiffs alleged that John Pelkes had acquired 30,598 shares of stock in the Sunshine Mining Company; that he had sold and disposed of all of that stock except 16,000 shares, which he had caused to be issued to Evelyn Treinies and that Katherine Mason, of the 16,000 shares standing in the name of Evelyn

Treinies, was the owner of 15,299 shares, which was acquired with the knowledge of the rights of the plaintiff in that suit. Thereafter all of the defendants in that action appeared and a trial was had resulting in a decree in the Idaho District Court decreeing to Katherine Mason the [fol. 729] ownership of 7,649 shares and to Evelyn Treinies 8,351 shares of the 16,000 shares of the capital stock of the Sunshine Mining Company. The Thinnes were dismissed in that action prior to the entry of the decree, and the decree there required Evelyn Treinies to surrender her certificate of stock for cancellation and when that was done the Sunshine Mining Company was to issue to Katherine Mason 7,649 shares and to Evelyn Treinies 8,351 shares and to pay the dividends accrued to each of the parties according to their ownership and in the event that Evelyn Treinies failed to surrender her certificate within ten days the Sunshine Mining Company should cancel the certificate and issue one to Katherine Mason for 7,649 shares and pay to her the dividends accrued thereon, and issue to Evelyn Treinies a certificate for 8351 shares of the 16,000 shares, upon her complying with the decree. An appeal was taken from that decree to the Supreme Court of the State of Idaho, by Evelyn Treinies, and the Sunshine Mining Company and the Masons cross-appealed.

John Pelkes and Evelyn Treinies failed to comply with that decree and surrender the certificate of stock and the Sunshine Mining Company, for the purpose of staying the decree, cancelled the certificate of stock standing in the name of Evelyn Treinies and re-issued in lieu thereof 7,649 shares in the name of Katherine Mason and 8,351 shares in the name of Evelyn Treinies, and deposited the same with the Clerk of the State District Court. About July 23, 1936 the appeals of the parties were determined by the Supreme Court of Idaho in which the decision of the trial Court was modified to the effect that Katherine Mason was found to be the owner of 15,299 shares of the stock together [fol. 730] with the dividends accrued and accruing thereon, and Ordered the Clerk of the Court to properly endorse the certificate and deliver the same to Katherine Mason. Complying with that decision, the Sunshine Mining Company, on August 20th, issued to Katherine Mason 15,299 shares, which were in lieu of the certificate deposited with the Clerk of the State Court, and paid \$42,225.24 dividends accrued thereon.

Thereafter John Pelkes and Evelyn Treinies made application to the Supreme Court of the United States for writ of certiorari and obtained an injunction pending the appeal restraining Katherine Mason from transferring any of the certificates of stock or disposing of the dividends. The application was denied by the Supreme Court of the United States on January 11, 1937. Katherine Mason and T. R. Mason are now in possession of 15,299 shares of stock and \$42,225.24 dividends accrued thereon from August 4, 1934 to August 20, 1936. On December 14, 1934, and while the case was pending in the State District Court of Idaho, Katherine Mason filed a petition in the matter of the estate of Amelia Pelkes in the Superior Court of the State of Washington which she attempted to dismiss after John Pelkes filed a petition in that Court resulting in a decree entered May 31, 1935, wherein it was adjudicated that John Pelkes was the owner of 30,598 shares of the Sunshine Mining Company stock, that had formerly stood in his name on the records of that company. Subsequently John Pelkes presented the decree entered in the Probate proceedings in the Superior Court of Washington as a defense to the action then pending against him in the State District Court of Idaho, which with other defenses was considered and decided by the Supreme Court of Idaho. On August 12, 1936 and while the appeal was pending in the Supreme Court of Idaho, John Pelkes and Evelyn Treinies instituted [fol. 731] suit against Masons, Harrisons, Hansons and Keane and the Sunshine Mining Company, in the Superior Court of Spokane County, Washington, wherein they alleged that they were the owners of all of the 16,000 shares of stock and that the State District Court of Idaho, had no jurisdiction over them and were not bound by the decree entered by the State District Court of Idaho, and prayed that the Sunshine Mining Company be compelled to recognize their ownership in the stock.

While that cause was pending and on October 16, 1936 John Pelkes died and the Seattle First National Bank was appointed administrator of his estate. On January 11, 1937 an Order was entered, without notice to the defendants, in the cause pending in the Superior Court of Washington, appointing J. C. Cheney as temporary Receiver to take into his possession as receiver, the interest of John Pelkes in the cancelled certificate held by Evelyn Treinies. After the appointment of Cheney as Receiver, the Sunshine Min-

ing Company gave notice that they would not recognize the ownership of Masons in the 16,000 shares during the pendency of the litigation.

The action pending in the Superior Court for Spokane County was transferred to the Superior Court of Yakima County, Washington, where the motions and demurrers of the Sunshine Mining Company, Harrisons and Hansons were presented and taken under advisement by Judge Hawkins. A temporary restraining Order was issued out of Judge Hawkin's Court restraining the Sunshine Mining Company from transferring the stock.

It is apparent from the proceedings in the two State Courts that the two decrees purport to establish inconsistent rights of ownership in the stock and dividends and therefore the fundamental inquiry of the present compli- [fol. 732] cated litigation is; Under which of the decrees and acts of the parties, who are now entitled to have decreed to them the ownership of the 15,299 shares of stock and dividends which the Sunshine Mining Company now requests this Court to determine?

Some years ago John Pelkes and Amelia Goetz, a widow with two children, married, one of the childred died in infancy the other is Katherine Mason. In 1922 Amelia Pelkes died testate, in Spokane, Washington. The property of the couple was community property and by will, Amelia Pelkes gave her one-half of the community to be disposed of in equal shares to her husband John Pelkes and her daughter Katherine Mason. The will of Amelia Pelkes was probated in 1922 in the Superior Court for Spokane County, Washington, sitting in probate. The laws of the State of Washington (Revised Statutes Section 11213) requires a statement of the property be accompanied with the petition, for letters of administration. These shares of stock were not included in the inventory and appraisal of the property in that estate, nor specifically mentioned in the final account or decree of distribution, although the decree of distribution contains the general clause "any other property not known or described, which may belong to said estate."

After the decree of distribution Pelkes and Mrs. Mason made an equal division of the property affected, and that the stock here involved they agreed that Pelkes was to hold title to the 15,299 shares for Mrs. Mason in trust for her. Pelkes the 1933 transferred 16,000 shares of the stock which

included the 15,299 shares to Treinies. After repudiating the trust agreement, Mrs. Mason instituted the suit re-[fol. 733] ferred to, against him on August 4, 1934, in the State District Court of Idaho, to establish and enforce the trust.

The parties now present two diverse contentions as to who is the owner of the 15,299 shares of stock and the dividends accruing thereon, and Evelyn Treinies and the administrator of the estate of John Pelkes assert ownership therein based upon a judgment of the Superior Court for Spokane County, Washington, rendered May 31, 1935 in the estate of Amelia Pelkes in which they urge was a judgment of a court having prior jurisdiction of the controversy and was therefore entitled to full faith and credit in every court in which title to the shares of stock was subsequently the subject of adjudication. While on the other hand Masons, Harrisons, Hansons and F. C. Keane urge that the decisions, judgment and order entered by the Supreme Court of Idaho, wherein Katherine Mason was decreed to be the owner of 15,299 shares and dividends, is conclusive and constitutes a bar to further prosecution in an action by Treinies or Pelke's successor. These contentions all call for a consideration of the proceedings had in the Washington and Idaho Courts in order to determine which judgment is final and binding upon the parties.

Referring then, first, to the proceedings initiated in the Washington Superior Court, we find that the Superior Court of Spokane County, Washington, sitting in probate, on August 9, 1923, entered a decree of distribution in the estate of Amelia Pelkes wherein her will of date, September 25, 1918, was probated, distributing all of the property of the estate including that not known or described to the sole legatees under the will, who were John Pelkes, her husband and Katherine Mason, a daughter by a former marriage. The mining stock here in question was not specifically described in that decree. In carrying out the terms of the will, the decree of distribution decreed, "that the residue of said estate of Amelia Pelkes, herein-after particularly described, and now remaining in the hands of said executor, and any other property not known or described, which may belong to said estate, or in which said estate may have any interest, be and the same is hereby distributed to and vested in the following persons in the following portions, to-wit: John Pelkes, husband, Spokane,

Washington, an undivided one-half interest thereof; Katherine Mason, daughter, Kellogg, Idaho, an undivided one-half interest.

"By this decree said John Pelkes becomes the owner of an undivided three-fourths interest in the property described in the inventories on file herein, or the proceeds thereof, and the said Katherine Mason becomes owner of the remaining one-fourth interest undivided, in said property, the said John Pelkes being the owner of a community or undivided one-half interest of the said property at the time of the death of his wife, the said Amelia Pelkes.

"The following is a particular description of said residue of said estate referred to in this decree and of which distribution is ordered, adjudged and decreed." (Then follows a description of the property, in which no mining stock is mentioned.) It appears that all of the property in which Amelia Pelkes had interest at the time her will was executed and her death was community property in which she had an undivided one-half interest and her husband, John Pelkes, and undivided one-half interest, under the laws of both the states of Washington and Idaho. John Pelkes was, under the will and Order of the Superior Court of Washington appointed executor of the estate [fol. 735] without bond, as provided in the will, to fully execute and distribute the estate without any application to any Court for leave or confirmation, and without any intervention of any Court unless the same is expressly required by law. The next step taken in the Superior Court of Washington was December 19, 1934, some eleven years after the decree of distribution, and subsequent to the commencement of the present action on August 4, 1934, in the Idaho Court, when Mrs. Mason filed a petition in the Superior Court of Washington wherein she alleged among other things that certain property belonging to the estate including 30,598 shares of capital stock of the Sunshine Mining Company had not been inventoried or probated, and she further alleged that Pelkes as executor had wasted or embezzled the property and had committed fraud upon the estate and that he was incompetent to act and requested that he show cause why he should not be removed as executor and his letters of administration revoked. Later she sought to dismiss her petition. Pelkes replied to the petition and alleged that he was the owner of the stock.

Thereafter on May 31, 1935, the Superior Court for Spokane County, Washington, entered a judgment now relied upon by Evelyn Treinies and the administrator of the estate of John Pelkes, in which it ordered that Mrs. Mason had no interest in the shares of stock by reason of an agreement between her and John Pelkes, and adjudged the estate of Amelia Pelkes to have been fully administered upon and closed.

In the steps taken in the Courts of Idaho, and we find that the first proceeding was a suit initiated on August 4, 1934, in the State District Court of Idaho, by Katherine Mason and T. R. Mason her husband against John Pelkes, Evelyn Treinies, Francis Thinnies and Pierre Thinnies [fol. 736] her husband and the Sunshine Mining Company to procure a decree adjudging 15,299 shares of the capital stock of the Sunshine Mining Company to have been held by Pelkes in trust for Katherine Mason prior to his transfer of it to Treinies, Thinnies and his wife, and that the transfers were fraudulent and without consideration and a violation of the trust. The State District Court of Idaho awarded to Katherine Mason 7,649 shares of stock evidenced by certificate No. 2777-A held by Treinies, and he and her husband were adjudged to be the owners of the dividends accrued thereon since August 4, 1934. Treinies was required to endorse and deliver to the Sunshine Mining Company the certificate which was to be cancelled and in lieu thereof to issue to Katherine Mason a certificate for 7,649 shares and pay to plaintiffs the dividends accrued and accruing thereon since August 4, 1934, and also to deliver to Treinies or her assigns a certificate for the residue of the stock evidenced by certificate No. 2777-A and pay to her, or her assigns the dividends thereon accruing since August 4, 1934 and the defendants were enjoined from commencing or taking any further proceedings in the Courts of Washington in the matter of the estate of Amelia Pelkes, or in any Court.

An appeal was taken to the Supreme Court of Idaho, from the trial Court of Idaho, and on July 23, 1936, that Court rendered its decision modifying the decree of the trial Court and awarded to Katherine Mason the 15,299 shares of stock and the dividends accrued and accruing thereon since August 4, 1934, now in controversy, and required the Sunshine Mining Company to account for all dividends collected by them on the stock.

[fol. 737] With these recitals as to what has occurred in the State Courts of Washington and Idaho, and the Supreme Court of the United States, the first inquiry is as to the effect of the proceedings in the Superior Court of Washington, relative to the judgment of ownership of the 15,299 shares of stock at the time of the decree of distribution rendered on May 9, 1923, and the Judgment of May 31, 1935, under the records of the Superior Courts of that state. Under the laws of Washington, the Superior Court for Spokane County, sitting in Probate, had jurisdiction and power to probate the estate of Amelia Pelkes under her will and render a decree of distribution of property then inventoried and unknown property of which she may have been possessed and when such decree was rendered, title was vested in the beneficiaries under the will; Revised Statute of Washington, Sections 1371 and 1533. The effect of that decree and the interval between its entry and the final discharge of the executor is stressed by Evelyn Treinies and the administrator of the estate of John Pelkes as continuing the exclusive jurisdiction and power in the Superior Court of Washington, to decree and dispose of the shares of stock here involved. The decree of distribution of the personal property was a comprehensive and final one under the laws of Washington and if not appealed from cannot be collaterally attacked; *Alaska Banking and Safe Deposit Company vs. Noyes et al.*, 117 Pac. 492; *Parr v. Davidson et al.*, 262 Pac. 959, and being so, the executor pursuant to that decree delivered the whole of the property of the estate to the beneficiaries which passed out of the custody of the Superior Court of Washington. Nothing else was required of the executor to have been done, [fol. 738] except to make final account to the Court in which he was to report that he had complied with the decree of distribution and delivered to the heirs the property decreed to them. No further order or confirmation of the Court was required to have been made as to the shares of stock here involved, except the Court may, when a hearing is had for a distribution, partition among the persons entitled thereto, the estate held in common and undivided and designate and distribute their respective shares to the end that the estate may be administered and distributed to those entitled thereto, Revised Statute of Washington Section 1533; Under such circumstances the jurisdiction of the Probate Court was closed as to the shares of

stock here involved, after the heirs had made amicable division of their own property as no controversy then existed to which jurisdiction of the Probate Court could attach. The parties interests in these shares of stock could be definitely, mathematically determined under the decree of distribution as the decree gives to them a definite interest in the property which could be determined and partitioned by them as was done, and the executor, when in dealing with the number of shares of stock determined mathematically a definite number of shares to be delivered to the heirs and therefore it would not have required a petition for partition to be filed with the Court, after the final decree of distribution was made. The laws of the State of Washington provide that after decree of distribution was rendered on August 9, 1923, the parties must move within the time required by the laws of Washington if there is any dispute between them questioning the decree of distribution; Revised Statutes of Washington Section 466, and the effect of such a decree of distribution as said by the Supreme Court of Washington is that "it has all the force, effect and finality of any other final judgment rendered by a Superior Court"; *In re Doane's Estate* 116 Pac. 847, 849. The Supreme Court of that state disposed of the theory as to the Superior Court sitting in Probate continuing jurisdiction to adjudicate property of an estate after it was decreed in a decree of distribution, in the case of *In re Thompson's estate* 188 Pac. 784, 785, where it was held that after an heir had disposed of her interest in the estate she no longer could have a legal interest in the probate matter, and the probate Court was not entitled to in any way consider it. The fact that Katherine Mason filed a petition in the Superior Court of Washington on December 19, 1934, after decree of distribution was rendered and claiming a right under the will to have complete administration of the estate in ascertaining whether there were any unadministered assets presented an issue between a claimant under the will and the executor as such. To her petition, Pelkes answered, denying that there were unadministered assets, that would give the Washington Court jurisdiction, and then as an individual he pleaded by cross-petition and sought adjudication upon a contractual controversy which he had previously submitted to the Idaho Court who had obtained jurisdiction as a court of equity to hear and determine the issue of fact to enforce

a trust claimed to have been entered into in Idaho, where the shares of stock were, and growing out of a division of property made pursuant to a family settlement. In the Idaho case Mrs. Mason was not estopped by reason of her filing the petition in the Superior Court of Washington as the doctrine of estoppel is governed by the laws of the forum and in Idaho the rule is that no estoppel will arise [fol. 740] where there is no injury; *Coeur d'Alene v. Spokane, etc., Ry.*, 31 Idaho 160.

What then was the nature of the action in the Idaho Court? It was simply one to enforce an oral trust growing out of the division of personal property that had been derived from a decree of distribution after it had been completely distributed and therefore the cause of action was cognizable by a court of general equitable jurisdiction. That jurisdiction was vested in the Idaho Court. Pelkes and Treinies appeared in the Idaho Court which gave it jurisdiction over both parties and the subject matter. That jurisdiction attached before Mrs. Mason's petition was filed in December 1934 in the Superior Court of Washington. The Idaho Court then acquired jurisdiction first of the parties and the controversy over the ownership of the 15,299 shares of stock, and the decision of the highest Court of that state which was not disturbed by the Supreme Court of the United States when in denying Pelke's and Treinies' application for writ of certiorari, is final and conclusive upon the Federal Courts. While a denial of a petition for a writ of certiorari in a particular case does not constitute a precedent for any other case, yet it is an affirmance of the judgment in the particular case sought to be reversed. When as disclosed by the present record, which includes the record in the Idaho case, where the enforcement of a trust growing out of a division of the shares of stock involved, and the Supreme Court of Idaho having concluded, when in considering the issue of fact relative to the controversy of ownership of the shares of stock between the parties, to be owned by Katherine Mason, its decision upon that issue of fact is conclusive upon which it is based, and final and conclusive [fol. 741] upon the parties in all future litigation between them, when as said, it had jurisdiction first to determine that issue. The scope of the issue as to the existence of an oral trust now presented, involved in the Idaho case an adjudication of that issue. A reading of its opinion leaves no doubt that the ownership in the 15,299 shares of stock was

awarded to Katherine Mason, as the Court said after considering the same issue of fact as here: "This suit was commenced August 4, 1934, by Katherine Mason and T. R. Mason, her husband against John Pelkes, Evelyn H. Treinies, Frances Thinnies and Pierre Thinnies, her husband, and Sunshine Mining Company, to procure a decree adjudging 15,299 shares of capital stock of the mining company to have been held by Pelkes in trust for Katherine Mason prior to his transfer of it to Treinies, Thinnies and his wife; that the transfers were fraudulent and without consideration and in violation of the trust; that the defendants, other than the mining company, be enjoined from selling or otherwise disposing of the stock, and that the mining company be enjoined from permitting a transfer thereof and from paying any dividends thereon pending final determination of the suit; also for an accounting for dividends therefore paid. A temporary restraining order and injunction pendente lite were granted * * *.

"The Sunshine Mining Company stock here in controversy, aggregating 30,598 shares, belonged to the estate at the time of the decree of distribution and was treated by the executor and beneficiary, Pelkes, and Mrs. Mason, the other beneficiary named in the will, as a part of the estate so distributed. They thereafter brought all personal property derived from the estate, including the certificates of shares of that mining stock, to Idaho and entered into an [fol. 742] agreement for the division thereof and it was divided. The only disagreement between them is Pelkes insists it was agreed he was to have all the mining stock while Mrs. Mason insists the agreement was she was to have half of it. The distribution of property which both parties claim was made being one-fourth to Mrs. Mason and three-fourths to Pelkes, included that made under the omnibus clause of the decree which distributed "any other property not now known or described," and disposed of the entire estate, including the mining stock, and both parties so understood and agreed. No controversy existed, or now exists, between the parties over the distribution of the property, and the only dispute is as to the terms of the agreement between them, after the distribution was ordered and made, whereby it was divided. The mining stock, having been distributed, was no longer property of the estate and the Washington Court, sitting in probate, did not have jurisdiction of it.

"A decree in probate, distributing an estate, is a final adjudication, subject to appeal, of the rights of the distributees to receive the property awarded to them, but a Court of probate has not jurisdiction to decide questions of title, to the property distributed, arising out of contracts between the distributees after the decree is entered. * * *

"There is no contention that fraud was practiced or that mistake occurred in making the division, the controversy is as to the terms of the agreement, voluntarily entered into between the parties with full knowledge of the facts, by which the division was made. Respondents' contention is that 15,299 shares of Sunshine Mining Company stock were, by the agreement, held in trust for Mrs. Mason by Pelkes and were by him transferred in violation of the trust to Treinies, who took them with knowledge of it. This contention [fol. 743] is sustained by the evidence. Appellants, other than the mining company, contend that said stock, and all of it, became the property of Pelkes in the division of the estate of Amelia Pelkes, deceased, and was not held in trust by him for Mrs. Mason. This contention is not sustained by the evidence.

"Conclusions of law, consistent with the findings, were made and the decree, heretofore referred to, was entered.

"The case is remanded to the district Court with directions to amend the findings of fact and conclusions of law to conform to the views herein expressed, and to amend and modify the decree and therein award to Katherine Mason 15,299 shares of the capital stock of Sunshine Mining Company in controversy herein, and adjudge respondents to be the owners of the dividends accrued and accruing thereon since August 4, 1934, and require appellants, other than Sunshine Mining Company to account for all dividends collected by them on said stock, and award judgment against them, severally, in favor of respondents, for any balance found to be due on account thereof. Costs are awarded to respondents."

Its effect is a bar to the present proceeding in so far as it seeks to deprive Katherine Mason of the ownership of the 15,299 shares; *American Surety Co., v. Baldwin* 51 Fed (2) 596 which was affirmed by the Supreme Court in 287 U. S. 156. Public policy dictates that there be an end of litigation, and especially where the parties have contested an issue in a court having first jurisdiction. This thought is forcibly expressed by Mr. Justice Roberts in the case of *Baldwin v.*

Iowa State Traveling Men's Association, 283 U. S. 522, 523, where it is said: "Public policy dictates that there be an [fol. 744] end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

With the views thus expressed the conclusion is reached that Katherine Mason is the owner of the 15,299 shares of stock and all dividends accruing thereon since August 4, 1934.

Attention is called to the status of the 701 shares of stock in the Sunshine Mining Company, which is the difference between the 16,000 shares and the 15,299 shares, now being held by the Sheriff of Shoshone County, Idaho, under a levy issued out of the State District Court of Idaho, upon a judgment of that Court for \$19,429.73 in favor of the Masons, entered pursuant to directions of the Supreme Court of Idaho, for past dividends collected by Treinies and Pelkes. A certificate for 701 shares was issued in the name of Treinies and deposited in the State District Court. The ownership of the 701 shares in Evelyn Treinies is not questioned here, but the Masons contend that since the remittitur came down from the Supreme Court of Idaho, the 701 shares and dividends accrued thereon are subject to the lien of their judgment. That contention is upheld by the Supreme Court of Idaho, and therefore, the 701 shares and dividends accruing thereon are subject to the satisfaction of the Masons judgment, and the Sheriff is directed to proceed accordingly.

[fol. 745] Costs are awarded in favor of Katherine Mason, and Counsel for her are requested to prepare findings and decree in accordance with the conclusions here reached, and serve copy upon opposing counsel, to be submitted to the Court within fifteen days.

[fol. 746] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 14, 1937

To the Honorable Charles C. Cavanah, Judge of the United States District Court for the District of Idaho, Northern Division:

The above named defendants and cross-complainants, Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and J. C. Cheney, as receiver, feeling themselves aggrieved by the decree made and entered in this cause on the 18th day of June, 1937, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith. And they pray that their appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit [fol. 747] Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

Dated September 14, 1937.

R. E. Lowe, Paul H. Graves, Solicitors for Appellants. Danson, Lowe & Danson, of Counsel. Graves, Kizer & Graves, of Counsel.

[fol. 748] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 14, 1937

And now, on this 14th day of September, A. D. 1937, came the defendants Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, deceased, and J. C. Cheney, as receiver, by their solicitors, and say that the findings of fact, conclusions of law and decree entered in the above cause on the 18th day of June, 1937, are erroneous and unjust to these defendants:

First, because that portion of finding of fact number XVI made by the court and reading as follows:

"That in said petition said Katherine Mason prayed for certain relief. That shortly thereafter said John Pelkes, now deceased, filed his petition in said probate cause. That subsequently thereafter said Katherine Mason moved to dismiss her said petition, but such proceedings were had in said probate cause upon an independent petition of John Pelkes as executor -as resulted in a decree being entered in said probate cause on the 31st day of May, 1935 * * *."

does not fully and correctly find the matters and things occurring in the Superior Court of the State of Washington for Spokane County as shown by the pleadings in this action and not disputed; and upon the facts so shown these defendants were entitled to a decree that the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), as administrator with the [fol. 749] will annexed of the estate of John Pelkes, deceased, were the owners of the 16,000 shares of the Sunshine Mining Company stock in this litigation, together with all dividends in controversy; and that the said facts so shown and not disputed entitle the defendants Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), as administrator with the will annexed of the estate of John Pelkes, deceased, and J. C. Cheney, as receiver, to a decree that the defendants Katherine Mason and T. R. Mason had no interest in said 16,000 shares of stock, or to any dividends thereon.

Second, because the court erred in making that portion of finding of fact XVIII reading:

"That the said J. C. Cheney * * * has attempted and is attempting to take into his possession as such the undivided interest in the assets of the Sunshine Mining Company, of which the canceled certificate of stock held by Evelyn H. Treinies is alleged to be the indicia of ownership * * *. And that the said J. C. Cheney has attempted and is attempting to take into his possession an undivided interest in the assets of the Sunshine Mining Company, as alleged to be evidenced by such canceled certificate of stock of the Sunshine Mining Company standing in the name of Evelyn H. Treinies."

[fol. 746] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 14, 1937

To the Honorable Charles C. Cavanah, Judge of the United States District Court for the District of Idaho, Northern Division:

The above named defendants and cross-complainants, Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the estate of John Pelkes, deceased, and J. C. Cheney, as receiver, feeling themselves aggrieved by the decree made and entered in this cause on the 18th day of June, 1937, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith. And they pray that their appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit [fol. 747] Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

Dated September 14, 1937.

R. E. Lowe, Paul H. Graves, Solicitors for Appellants. Danson, Lowe & Danson, of Counsel. Graves, Kizer & Graves, of Counsel.

[fol. 748] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 14, 1937

And now, on this 14th day of September, A. D. 1937, came the defendants Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), administrator with the will annexed of the Estate of John Pelkes, deceased, and J. C. Cheney, as receiver, by their solicitors, and say that the findings of fact, conclusions of law and decree entered in the above cause on the 18th day of June, 1937, are erroneous and unjust to these defendants:

First, because that portion of finding of fact number XVI made by the court and reading as follows :

“That in said petition said Katherine Mason prayed for certain relief. That shortly thereafter said John Pelkes, now deceased, filed his petition in said probate cause. That subsequently thereafter said Katherine Mason moved to dismiss her said petition, but such proceedings were had in said probate cause upon an independent petition of John Pelkes as executor -as resulted in a decree being entered in said probate cause on the 31st day of May, 1935 * * *.”

does not fully and correctly find the matters and things occurring in the Superior Court of the State of Washington for Spokane County as shown by the pleadings in this action and not disputed; and upon the facts so shown these defendants were entitled to a decree that the defendants Evelyn H. Treinies and Seattle-First National Bank (Spokane and Eastern Branch), as administrator with the [fol. 749] will annexed of the estate of John Pelkes, deceased, were the owners of the 16,000 shares of the Sunshine Mining Company stock in this litigation, together with all dividends in controversy; and that the said facts so shown and not disputed entitle the defendants Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), as administrator with the will annexed of the estate of John Pelkes, deceased, and J. C. Cheney, as receiver, to a decree that the defendants Katherine Mason and T. R. Mason had no interest in said 16,000 shares of stock, or to any dividends thereon.

Second, because the court erred in making that portion of finding of fact XVIII reading :

“That the said J. C. Cheney * * * has attempted and is attempting to take into his possession as such the undivided interest in the assets of the Sunshine Mining Company, of which the canceled certificate of stock held by Evelyn H. Treinies is alleged to be the indicia of ownership * * *. And that the said J. C. Cheney has attempted and is attempting to take into his possession an undivided interest in the assets of the Sunshine Mining Company, as alleged to be evidenced by such canceled certificate of stock of the Sunshine Mining Company standing in the name of Evelyn H. Treinies.”

for the reason that the answer of the said J. C. Cheney in this proceeding alleged that the said J. C. Cheney as receiver had "served a certified copy of the order appointing him receiver upon said Sunshine Mining Company and endorsed upon the records of said Sunshine Mining Company the taking in possession of said stock and dividends and said mining company covenanted and agreed not to disburse any dividends to anyone until further order of the Superior Court of the State of Washington, and by such action took into his possession as said receiver said shares in said Sunshine Mining Company and said dividends". And that these allegations of fact were not disputed or denied by any parties in this proceeding; and further for the reason that under said undenied facts the said decree of this court was erroneous in ignoring the jurisdiction of the Superior Court of the State of Washington for Yakima County, and the pos-[fol. 750] session of that court through its receiver of the res involved in this action; and for the further reason that said facts which were not disputed required this court to recognize the exclusive jurisdiction of the Superior Court of the State of Washington for Yakima County through its possession of the res.

Third, because the court erred in making finding of fact XXIII as follows:

"That after the decree of distribution Pelkes and Mrs. Mason made an equal division of the property affected, and as to the stock here involved they agreed that Pelkes was to hold title to the 15,299 shares for Mrs. Mason in trust for her. Pelkes in 1933 transferred 16,000 shares of the stock, which included the 15,299 shares to Treinies. After repudiating the trust agreement, Mrs. Mason instituted the suit referred to against him on August 4, 1934, in the state district court of Idaho to establish and enforce the trust."

for the reason that the facts therein found are not facts involved in the trial of this case or before the court and there is no evidence thereof to support the said finding of fact, but that facts so found are those involved in the actions previously tried in the Superior Court of the State of Washington and in the District Court of the State of Idaho; and further for the reason that the only fact involved in this case is the question of the appropriate jurisdiction of the

courts of the State of Idaho and the court of the State of Washington to enter respective judgments and decrees so entered by them.

Fourth, because the court erred in making that portion of finding of fact XXV which reads :

“ * * * John Pelkes was, under the will and order of the Superior Court of Washington, appointed Executor of the estate without bond, as provided in the will, to fully execute and distribute the estate without any intervention of any court unless the same is expressly required by law.”

for the reason that the same is a conclusion of law rather than a finding of fact, and that the conclusion of law so made is erroneous in that under the law of Washington, it is optional with the said executor whether or not he submits the matter of the distribution of the estate to the court having jurisdiction of the will so appointing him, and that [fol. 751] when the matter is submitted to the court, its determination thereof is binding on all parties concerned. That moreover in said circumstances an heir or those beneficially interested in the estate may seek adjudication of their rights before the Superior Court having jurisdiction of the will and the executor.

Fifth, because the court erred in making that portion of finding of fact XXV which reads :

“(referring to Katherine Mason) Later she sought to dismiss her petition. Pelkes replied to the petition and alleged that he was the owner of the stock.”

for the reason that said finding is only fragmentary and the court does not directly find the facts which occurred in that the records, and particularly exhibits 11, 12 and 13, show that Pelkes answered the petition of Katherine Mason in the Superior Court of the State of Washington and set up certain matters in defense, which answer of Pelkes was resisted by the said Katherine Mason, she contending that the court had no jurisdiction of the matter, and the record further shows without dispute that she caused this matter to be submitted through her attorneys to the Supreme Court of the State of Washington by seeking writ or writs of prohibition to prevent the Superior Court of the State of Washington from proceeding in the matter, which application was

denied, and that she did not seek to dismiss her petition until after these things had been done, all such matters being more fully shown by the record in this case.

Sixth, because the court erred in not including in its findings the proposed findings of the defendants Evelyn H. Treinies and Seattle-First National Bank, covering matters and things established by the evidence and the pleadings and admitted to be true. All such matters and things were material in that (a) said matters and things established that the Superior Court of the State of Washington as a matter of law had prior and superior jurisdiction over the questions involved in the controversy between the parties; (b) that the defendant Katherine Mason had herself sought that jurisdiction and invoked the exercise thereof by [fol. 752] the Superior Court of the State of Washington; (c) that Katherine Mason did not attempt to withdraw from said court or dismiss the petition which she had presented to it until she had sought rulings of the court upon the merits and those rulings were adverse; (d) that said matters and things so undisputed lead to the necessary conclusion that the Superior Court of the State of Washington had original and exclusive jurisdiction of the controversy between the parties over the ownership of 16,000 shares of stock of the Sunshine Mining Company, together with dividends thereon, as well as jurisdiction of the parties to said controversy; and (e) that the matters and things so alleged, established and not disputed required the court to enter a decree finding that, as a matter of law, the ownership of 16,000 shares of the capital stock of the Sunshine Mining Company, together with dividends, by defendants Evelyn H. Treinies and Seattle-First National Bank was established.

Seventh, because the court erred in making finding of fact XXVI as follows:

"The court finds that the 701 shares of stock of plaintiff, Sunshine Mining Company, a certificate for which is now in the hands of the Sheriff of Shoshone County, State of Idaho, is subject to sale by the Sheriff of Shoshone County, State of Idaho, together with all dividends which have accrued thereon, for the purpose of satisfying the judgment of \$19,429.73 in favor of Mason, which said judgment was entered pursuant to the directions of the Supreme Court of the

State of Idaho, and the defendants Katherine Mason and T. R. Mason are entitled to have said shares of stock sold by the Sheriff of Shoshone County, State of Idaho, and the proceeds applied to the payment and satisfaction of said judgment for \$19,429.73, with interest."

for the reason that the same is a conclusion of law based upon the assumed validity and priority of a judgment entered by the District Court of the State of Idaho for Shoshone County and that said conclusion of law so denominated a finding of fact is an erroneous conclusion of law in that it assumes that Katherine Mason and T. R. Mason are entitled to a judgment in the sum of \$19,429.73, and assumes that the District Court of the State of Idaho for Shoshone County had jurisdiction to enter said judgment, and further is an affirmance of the merits of a case tried in that court, [fol. 753] when the only question before the United States District Court in the present case was which court had jurisdiction of the subject matter and which court had the right to enter a decree binding upon the parties.

Eighth, because the court erred in making its conclusion of law IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI, XVII in that it concluded as a matter of law that defendants Katherine Mason and T. R. Mason, Lester S. Harrison and wife, Walter H. Hanson and wife and F. C. Keane were entitled to a decree that Katherine Mason and T. R. Mason are the owners of 15,299 shares of the capital stock of the Sunshine Mining Company, together with past dividends thereon, the error of the court in reaching said conclusion of law being that the matter of the title to said stock was decided by the Superior Court of the State of Washington for Spokane County in favor of John Pelkes, the person under whom the defendant Evelyn Treinies claims title, and that said Superior Court of the State of Washington for Spokane County had jurisdiction, and exclusive jurisdiction, to determine said questions. The court further erred in reaching said conclusion of law by giving effect to the decree of the District Court of the State of Idaho for Shoshone County when said court at the time of entering its decree did not have jurisdiction to determine the title and ownership of said stock, the same being prior to that time in the exclusive jurisdiction of the Superior Court of the State of Washington for Spokane County.

Ninth, the court erred in making said conclusions of law IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI, XVII in that the court did not give effect to the judgment and decree of the Superior Court of the State of Washington in and for Spokane County in which the said court had determined the question of said ownership, in a matter in which it had exclusive jurisdiction and in a proceeding in which the plaintiff Katherine Mason had invoked that jurisdiction.

[fol. 754] Tenth, because the court erred in entering its decree based upon the said conclusion of law, decreeing that Katherine Mason and T. R. Mason were entitled to the shares of stock and dividends thereon deposited in the registry of the court, when the title and ownership of said stock had been decided adversely to the defendant Katherine Mason by the Superior Court of the State of Washington for Spokane County in a proceeding in which said court had exclusive jurisdiction and in which said question was directly presented.

Eleventh, because the court gave effect to a decree of the District Court of the State of Idaho for Shoshone County, entered in a proceeding in which the court did not have jurisdiction of the controversy decided by it, and said decree was an attempt to control the action of the Superior Court of the State of Washington for Spokane County and to review the same.

Twelfth, because the court erred in by its decree disposing of the title and right to possession of certain stock, namely, 15,299 shares of Sunshine Mining Company stock without recognizing the prior jurisdiction to determine such question which had vested in the Superior Court of the State of Washington for Yakima County, as shown by the uncontradicted answer of J. C. Cheney as receiver.

Thirteenth, because the court erred in by its decree decreeing that 701 shares in the registry of the District Court of Shoshone County, Idaho, and the dividends on said 701 shares of stock applied in satisfaction of the judgment of Katherine Mason against Evelyn H. Treinies for the reason that said sum awarded Katherine Mason, \$69,425.36, was entered by the Court of the First Judicial District of the County of Shoshone, Idaho, without jurisdiction of the subject matter of the action, to-wit, 16,000 shares of stock

of the Sunshine Mining Company, and the right, title and ownership thereof, said question of ownership having been previously determined by a Court of exclusive and prior jurisdiction, that is the Superior Court of the State of [fols. 755-822] Washington for Spokane County.

Wherefore, the said defendants pray that the judgment may be reversed.

R. E. Lowe, Paul H. Graves, Solicitors for Appellants. Danson, Lowe & Danson, of Counsel. Graves, Kizer & Graves, of Counsel.

[fol. 823] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 8730

EVELYN H. TREINIES et al., Appellants,

vs.

SUNSHINE MINING COMPANY et al., Appellees

SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed May 2, 1938

Comes now the appellant, Evelyn H. Treinies, in the above entitled cause, and in consideration with, and in support of her appeal herein, submits the following Supplemental Assignment of Error as the basis for a reversal of judgments entered in the above entitled cause, as manifest error in the records, proceedings and judgments in said cause, as follows, to-wit:

I

The Court erred in making that portion of Finding of Fact 10, in which it is recited "that the above entitled Court has jurisdiction to entertain this controversy," upon the reason that by such finding the Court wrongfully divests the Superior Court of the State of Washington in and for Yakima County, of jurisdiction acting by and through the appellant authority of the Federal Interpleader Act, as amended, it being respectfully submitted that where said Superior Court of the State of Washington has impounded property in such a manner that said Court has become a Court of exclusive jurisdiction and control over said property, it is not the intention of Congress nor the Act, nor

is it within the Constitutional authority under such state [fols. 824-842] of facts, to divest said Superior Court of jurisdiction, and any attempt so to do is a violation of Article 4, Section 1 of the Constitution of the United States; said Finding of Fact under said purported jurisdictional authority errs in requiring the said Superior Court of the State of Washington in and for Yakima County to surrender said property and desist from litigation pending before it under exclusive jurisdiction, where conflicting claims were made to such property by parties who were residents of several states, over which property the said Superior Court had already acquired exclusive jurisdiction insofar as it was necessary to determine the rights of said parties to said property in its possession jurisdictionally; said Finding of Fact further errs in the assuming jurisdiction under the Interpleader Act, so-called, in its determination and decree under said purported jurisdiction, in holding that the decisions of certain state Courts of the State of Idaho were binding and decisive upon the Judges and the Courts of the State of Washington, where said decisions were contrary to the laws of the Forum, said Courts of Washington having acquired exclusive jurisdiction over the property in question, and said decisions and laws of the Forum of Washington having been unchallenged by appeal in that Forum, said decision attempting to alter the decisions and laws of the Forum being a nullity and of no force and effect, and the conclusion of the statutes of the State of Washington, as construed by the Courts of Idaho and upheld by the District Courts below, being equally ineffective and inoperative, as governing the acts and decisions of the State of Washington.

[File endorsement omitted.]

[fols. 843-845] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER GRANTING PETITION FOR PERMISSION TO FILE SUPPLEMENTAL ASSIGNMENTS OF ERROR, AND DENYING PETITION FOR INJUNCTIVE RELIEF PENDING APPEAL—May 2, 1938

The petition of appellant Evelyn Treinies for (1) permission to file supplemental assignments of error, and (2)

for injunctive relief and show cause order for an injunction pendente lite in lieu of supersedeas coming on regularly for hearing, and there being no appearance in open court of counsel on behalf of appellant, Ordered said petitions submitted on behalf of appellant on papers filed, and argued by Mr. Richard S. Munter, counsel for appellees (Mr. John P. Gray, counsel for appellees, also being present) and submitted to the court for consideration and decision.

Upon consideration thereof, Ordered petition for permission to file supplemental assignments of error granted, and such assignments tendered with such petition be forthwith filed by the clerk and be added to the record herein.

It is Further Ordered that petition for injunctive relief and show cause order, etc., be, and hereby is denied.

[fol. 846] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 8730. Nov. 10, 1938

EVELYN H. TREINIES, SEATTLE-FIRST NATIONAL BANK, Administrator with the Will Annexed of the Estate of John Pelkes, Deceased; and J. C. Cheney, as Receiver, Appellants,

vs.

SUNSHINE MINING COMPANY, a Corporation KATHERINE MASON, T. R. Mason, Lester S. Harrison, Grace G. Harrison, Walter H. Hanson, Edna B. Hanson and F. C. Keane, Appellees

Upon Appeal from the District Court of the United States
for the District of Idaho, Northern Division

Before Denman, Mathews and Stephens, Circuit Judges

OPINION—Filed November 10, 1938

MATHEWS, Circuit Judge:

This was a suit in equity begun by a bill of interpleader, duly verified, filed in the District Court of the United States for the District of Idaho by Sunshine Mining Company, a corporation (hereafter called the company) against

Evelyn H. Treinies; Katherine Mason and T. R. Mason, her husband; Seattle-First National Bank, a national banking association located in Washington, as administrator with the will annexed of the estate of John Pelkes, deceased; J. C. Cheney, whom a State court of Washington, in a suit by Pelkes against the Masons and the company, had appointed as receiver; and six other defendants.¹ The bill [fol. 847] sought a determination of the respective rights and interests of the named defendants in and to 15,299 shares of the company's capital stock and dividends accrued and accruing thereon. From a decree in favor of the Masons,² Treinies, the administrator and the receiver have appealed.

The first question is whether the District Court had jurisdiction of the case.

Section 24(26) of the Judicial Code, 28 U. S. C. A. § 41(26), provides that the district courts of the United States shall have original jurisdiction:

“(a) Of suits in equity begun by bills of interpleader or bills in the nature of bills of interpleader duly verified, filed by any . . . corporation having in . . . its custody or possession money or property of the value of \$500 or more, or having issued a . . . certificate . . . or other instrument of the value or amount of \$500 or more . . . or being under any obligation written or unwritten to the amount of \$500 or more, if—

“(i) Two or more adverse claimants, citizens of different States, are claiming to be entitled to such moneys or property, or to any one or more of the benefits arising by virtue of any . . . certificate . . . or other instrument, or arising by virtue of any such obligation; and

(ii) The complainant (a) has deposited such money or property or has paid the amount . . . due under such obligation into the registry of the court, there to abide the judgment of the court. . . .

“Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a

¹ The named defendants were the real parties in interest. Being the only claimants of the stock or dividends, they were the only necessary parties defendant and, for present purposes, may be regarded as the only defendants.

² *Sunshine Mining Co. v. Treinies*, D. C., 19 F. Supp. 587.

common origin, or are not identical, but are adverse to and independent of one another.

“(b) Such a suit may be brought in the district court of the district in which one or more of such claimants resides or reside.

“(c) * * * [Said] court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any United States court on account of such money or property or on such instrument or obligation until the further order of the court. * * *

“(d) Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be necessary or convenient to carry out and enforce the same.”

The stock in controversy had a value of more than \$500. Prior to filing its bill, the company had issued certificates for the stock and was under an obligation to pay the rightful owner thereof accrued and accruing dividends thereon. Accrued dividends, at the time of filing the bill, amounted to more than \$500. The company, at that time, paid the then accrued dividends into the registry of the court, there to abide the judgment of the court. Dividends subsequently accruing were likewise so paid. Also, while the suit was pending, certificates representing the stock in controversy were deposited in the registry of the court. Appellants (Treinies, the administrator and the receiver) claimed the stock and dividends adversely to the Masons. The Masons were citizens and residents of Idaho. Appellants were citizens and residents of Washington. Clearly, therefore, the court had jurisdiction.

Answers were filed by all the named defendants. The Masons claimed that Katherine Mason was entitled to the 15,299 shares of stock, and that they (Katherine Mason and T. R. Mason) were entitled to all dividends thereon. They also claimed a judgment lien on 701 other shares of the company's capital stock which, they alleged, were the property of Treinies, and on the dividends thereon. Treinies and the administrator claimed that Treinies was entitled to all the stock mentioned—the 15,299 shares and

the 701 shares—and all dividends thereon, and denied that the Masons had a lien on any of the stock or any of the dividends. The receiver claimed that he was entitled to all the stock mentioned and all dividends thereon.

With respect to the 15,299 shares of stock and dividends thereon, all issues raised or attempted to be raised in this interpleader suit had, prior to the commencement thereof, been litigated and finally determined in a suit by the Masons [fol. 849] against Pelkes, Treinies and the company in a State court of Idaho³ (hereafter called the Idaho court). That suit (hereafter called the Idaho suit) was commenced on August 4, 1934. A decree was entered therein on September 30, 1935. All parties appealed. On July 23, 1936, the Supreme Court of Idaho remanded the case,⁴ with directions to amend and modify the decree so as to award the 15,299 shares of stock to Katherine Mason, and to adjudge her and her husband to be the owners of all dividends⁵ accrued and accruing thereon after August 4, 1934. The decree was so amended and modified and, thereupon, on August 18, 1936, was duly entered as the Idaho court's final decree. Certiorari to review that decree (hereafter called the Idaho decree) was denied on January 11, 1937,⁶ This suit was commenced on March 17, 1937.

Treinies and the Masons were parties to the Idaho suit. All rights which, in the interpleader suit, were claimed by the administrator and the receiver, or either of them, were claimed under Pelkes, who was a party to the Idaho suit. Therefore, if the Idaho decree was valid, all parties to the interpleader suit were concluded thereby. The question now to be decided is whether, as claimed by the Masons, the Idaho decree was valid, or whether, as claimed by appellants, it was void for want of jurisdiction.

The Idaho court was a court of general jurisdiction at law and in equity.⁷ The Masons (plaintiffs in the Idaho

³ The District Court of the State of Idaho in and for Shoshone County.

⁴ *Mason v. Pelkes*, 57 Ida. 10, 59 P. 2d 1087.

⁵ The stock was treated as the wife's separate property, the dividends as community property. Idaho Code, 1932, §§ 31-903, 31-907.

⁶ *Pelkes v. Mason*, 299 U. S. 615.

⁷ Constitution of Idaho, Art. 5, § 20; Idaho Code, 1932, § 1-705.

suit) invoked that jurisdiction. The defendants (Pelkes, Treinies and the company) appeared generally in the Idaho suit, thereby submitting themselves to the jurisdiction of the Idaho court. The Idaho suit was one to determine rights in personal property, namely, the 15,299 shares of stock and dividends thereon. More specifically, it was a suit to enforce a trust agreement between Pelkes and Katherine Mason, whereby Pelkes had agreed to hold the stock and dividends in trust for Katherine Mason. This agreement was made in Idaho. Both parties to the agreement and all persons having or claiming any interest in the stock or dividends, including the company which is-[fol.850] sued the stock and owed the dividends, were before the Idaho court. It is clear, therefore, that the Idaho court had jurisdiction of the Idaho suit.

The fact that the company which issued the stock was a Washington corporation is quite immaterial. Because of that fact, it is true, the stock had a situs in Washington (Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 13), but that was not its only situs. *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 1 Cir., 300 F. 741, 746, affirmed in 267 U. S. 22. Its other situs was in Idaho, where the Masons resided and all adverse claimants of the stock appeared voluntarily and litigated their claims.

The stock in controversy was formerly the property of John Pelkes and his wife, Amelia Pelkes, residents of Washington. Amelia Pelkes died testate on April 24, 1922. Her will was admitted to probate in a State court of Washington. Being community property,⁸ the stock became, for purposes of administration, a part of her estate.⁹ In the interpleader suit, it was alleged by appellants that the stock had not been distributed, but was still in custody of the Washington court, and that, therefore, the Idaho court had no jurisdiction to entertain the Idaho suit. The Masons denied these allegations and alleged that the stock was distributed on August 9, 1923, eleven years before the Idaho suit was commenced. That issue—as to when the stock was distributed—had been raised by Pelkes in the Idaho suit. The Idaho court was empowered to determine that issue and did determine it in favor of the Masons, holding that the stock was distributed on August 9, 1923. The

⁸ Remington's Revised Statutes, § 1342.

⁹ Id., §§ 6890-6892.

issue thus determined could not be relitigated in the interpleader suit.

How, if at all, the Idaho court's jurisdiction would have been affected by the fact—if it were a fact—that the stock had not been distributed when the Idaho suit was commenced, we need not and do not decide.

On May 31, 1935, while the Idaho suit was pending, the Washington court rendered a judgment to the effect that Pelkes was the owner of the stock and dividends in question, and that the Masons had no right, title or interest therein. In the interpleader suit, appellants pleaded the Washington judgment and alleged that the Idaho court was [fol. 851] thereby divested of whatever jurisdiction it might otherwise have had of the Idaho suit. The Masons denied this and asserted that the Washington judgment was itself void for want of jurisdiction. That issue—as to whether the Washington court had jurisdiction to render the judgment relied on by appellants—had also been raised in the Idaho suit. The Idaho court was empowered to determine that issue (*Pendleton v. Russell*, 144 U. S. 640, 644) and did determine it in favor of the Masons, holding the Washington judgment void for want of jurisdiction. The issue thus determined could not be relitigated in the interpleader suit.

Whether the issues determined by the Idaho decree were rightly or wrongly determined, is no longer open to inquiry. Having been rendered by a court which had jurisdiction to render it, and having long since become final, that decree, even though erroneous, is valid and conclusive on the parties thereto and all persons claiming under them. *Roche v. McDonald*, 275 U. S. 449, 454.

The Masons claimed a judgment lien on the 701 shares of stock owned by Treinies and on the dividends thereon, arising from a levy of execution issued under the Idaho decree. The District Court's decree recognized the lien and directed enforcement thereof. The sole ground on which appellants attack this part of the District Court's decree is that the Idaho decree was void for want of jurisdiction. That ground has been considered and shown to be untenable.

The District Court's decree awarded the company its costs and expenses (including attorneys' fees) in the aggregate sum of \$3,397.88. The award was proper (*Massachusetts Mutual Life Ins. Co. v. Morris*, 9 Cir., 61 F. 2d

104) and, we think, adequate. The company and other appellees will, of course, recover their costs on appeal.

Decree affirmed.

[File endorsement omitted.]

[fol. 852] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 8730

EVELYN H. TREINIES et al., Appellants,

vs.

SUNSHINE MINING COMPANY et al., Appellees

DECREE—Filed November 16 1938

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellees and against the appellants.

It is Further Ordered, Adjudged, and Decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fols. 853-854] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—November 29,
1938

Upon consideration thereof, and by direction of the Court, It is Ordered that the petition of appellant Treinies, filed November 26, 1938, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fols. 855-857] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 13, 1939

To the Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit:

DEAR SIR:

Please take notice that the appellants herein intend to present a petition for a writ of certiorari directed to the above entitled court and seeking reversal of its decision herein to the Supreme Court of the United States, and to that end respectfully request that you prepare the necessary transcript required to be forwarded with the petition.

Alfred C. Skaife, Thos. D. Aitken, Attorney- for
Appellants.

[File endorsement omitted.]

[fol. 857a] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated by and between the counsel for the respective parties in the above entitled certiorari proceedings that the items included in the attached proposed list of contents of the transcript on petition for certiorari compose the printed record herein.

Dated March 21st, 1939.

Nat U. Brown, C. W. Halverson, Attorney- for Re-
spondent, Sunshine Mining Company. Richard S.
Munter, for the Attorneys on Behalf of the Re-
spondents Other Than Sunshine Mining Company.
— — —, Attorney for Petitioner.

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(Respondents call attention in connection herewith to attached affidavit of C. W. Halverson, Esquire, of counsel for respondent Sunshine Mining Company.)

[fol. 858] AFFIDAVIT OF C. W. HALVERSON

UNITED STATES OF AMERICA,
State of Washington,
County of Yakima, ss:

C. W. Halverson, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the Sunshine Mining Company, one of the respondents in the above entitled cause. That he makes this affidavit for and on behalf of the Sunshine Mining Company for the purpose of setting forth certain facts relating to the proposed stipulation for printing the record to be used in the certiorari proceedings herein.

That this affiant has been one of the attorneys for the Sunshine Mining Company at all times since the beginning [fol. 859] of the litigation in the above entitled case. That the appeal from the judgment and decree of the United States District Court, for the District of Idaho, to the Circuit Court of Appeals of the United States for the Ninth Circuit was prosecuted by the petitioner herein in forma pauperis. That the record used in said appeal was typewritten but no copy of the entire record was served on or submitted to the Sunshine Mining Company or its attorneys, and said company or its attorneys have never had in their possession a complete copy of the entire record. That after the Sunshine Mining Company and its attorneys were advised by the Clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit, that permission had been granted to perfect an appeal to that court in forma pauperis, it was necessary to have the typewritten record as prepared by the attorneys for Evelyn H. Treinies shipped by the Clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit, to the Clerk of the District Court of the United States, for the Eastern District of Washington, at Spokane, Washington. That said typewritten record was there kept in the possession of the Clerk of said District Court, and it was necessary for this affiant to travel some 250 miles from Yakima to Spokane, Washington, and obtain access to the record at the Clerk's office there for the purpose of enabling him to write a brief on behalf of the Sunshine Mining Company

and make the necessary reference to the record. That said record was then shipped back to the Clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit [fol. 860] cuit. That this affiant knows of his own knowledge that the attorneys for the remaining appellees in preparing their briefs in the Circuit Court of Appeals had to likewise obtain access to said typewritten record in the Clerk's office at Spokane, Washington.

That this affiant has been advised by the Clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit, at San Francisco that the entire record in the above entitled cause has now been shipped to the Clerk of the Supreme Court of the United States at Washington, D. C. That the only information in possession of this affiant which indicates the page numbers of any of the record in the above entitled cause is a copy of the index to the same as prepared by the Clerk of the Circuit Court of Appeals at San Francisco. That it is impossible to stipulate for the printing of any of the record by page numbers as proposed by the attorneys for the petitioners, who had access to the certified record, as this affiant has no means of knowing what portions of the record are included in such stipulation. That the only available basis on which the respondent can stipulate is the index and the page numbers appearing thereon. That the attached stipulation is proposed on this basis and counsel for respondents have used their best efforts to avoid any duplications and make [fol. 861] the printed record as concise as possible.

C. W. Halverson.

Subscribed and sworn to before me this 14th day of March, 1939. Paul M. Goode, Notary Public in and for the State of Washington, Residing at Yakima. (Seal.)

[fol. 862] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 13, 1939

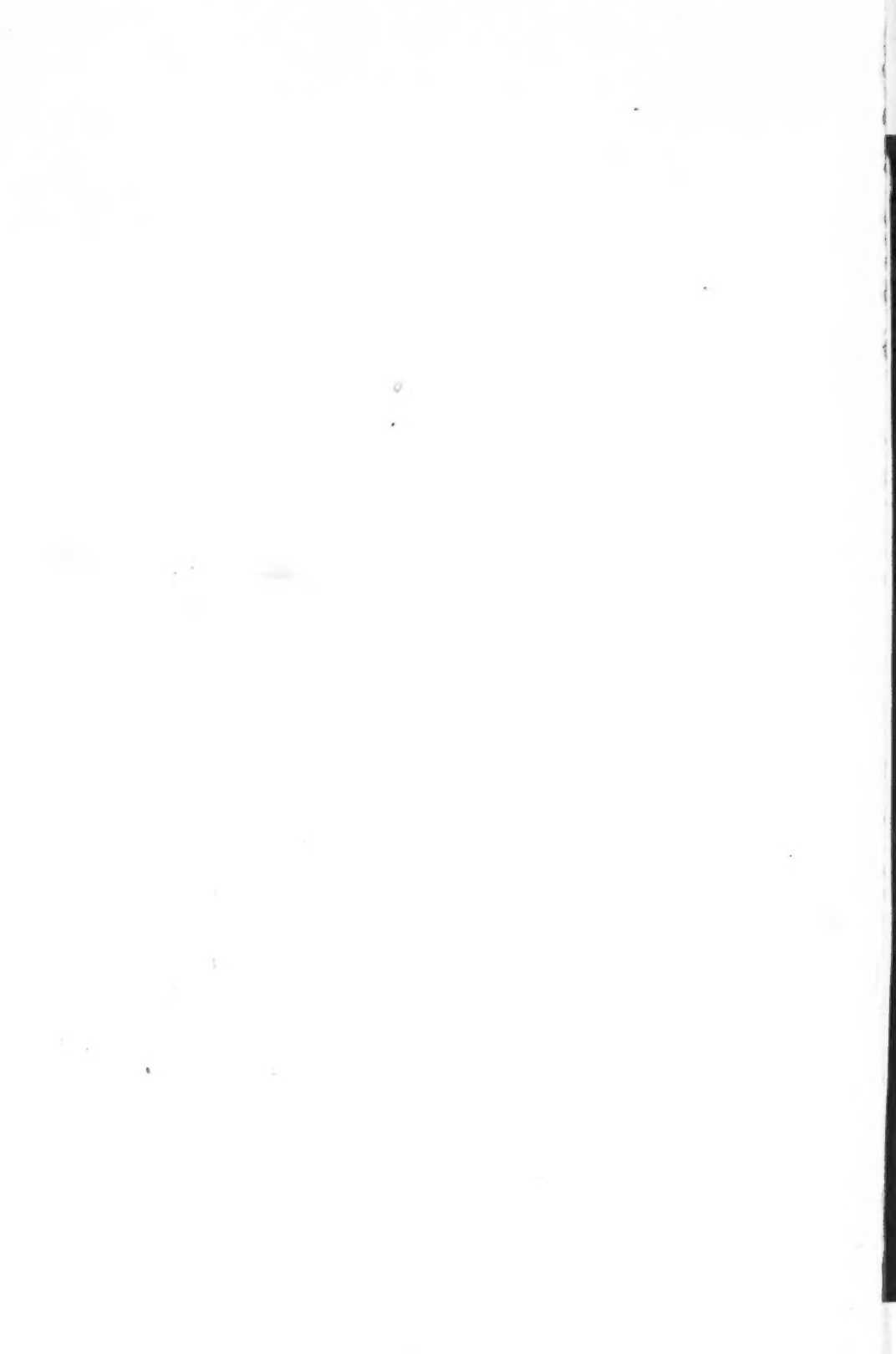
The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. File No. 43,111. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 626. Evelyn Treinies, petitioner, vs. Sunshine Mining Company, Katherine Mason, T. R. Mason, et al. Petition for a writ of certiorari and exhibit thereto. Filed January 30, 1939. Term No. 626, O. T., 1938.

(1720)





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 4

EVELYN TREINIES,

Petitioner,

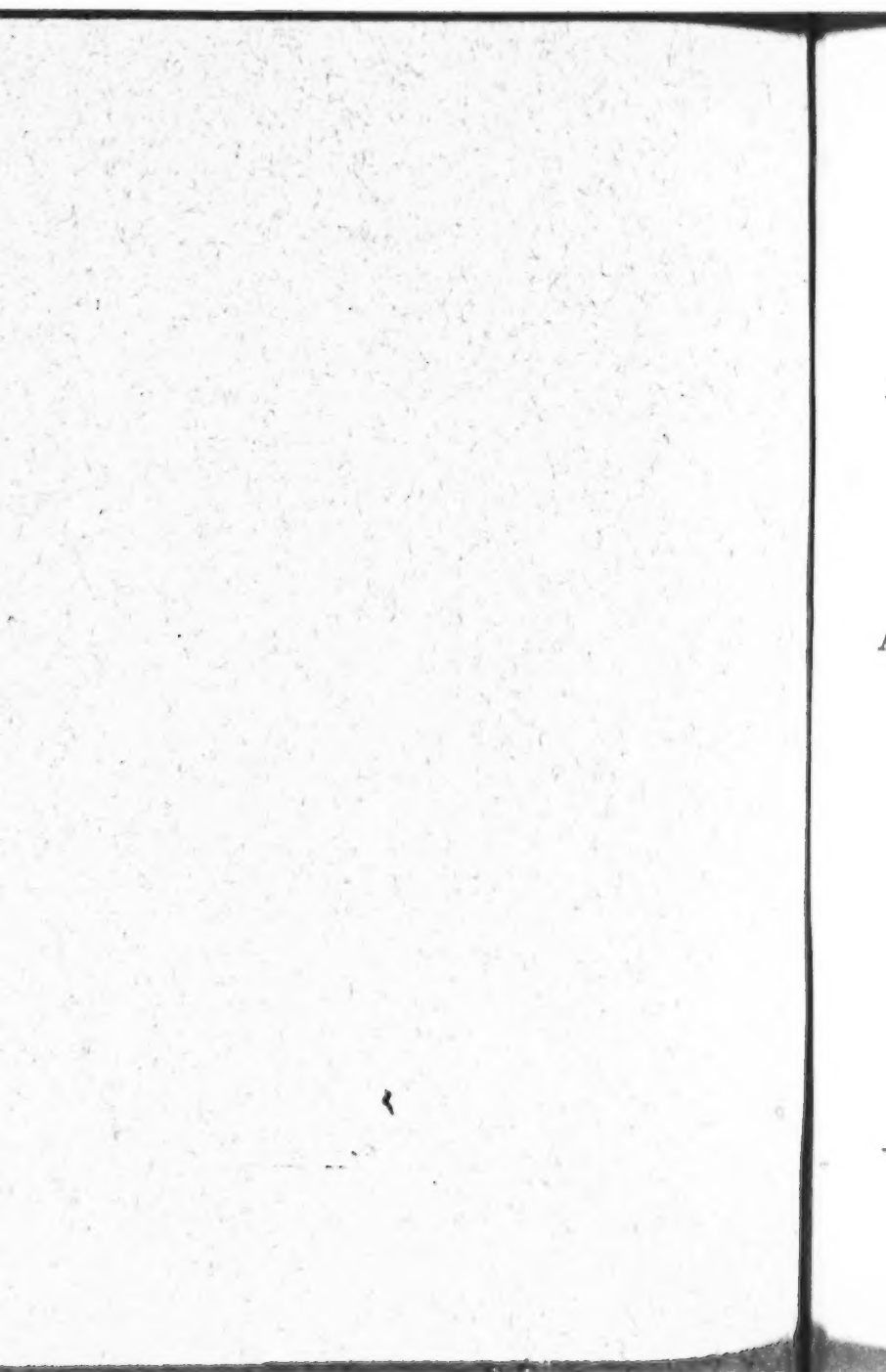
vs.

**SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON, AND F. C. KEANE.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCVIT AND BRIEF IN SUP-
PORT THEREOF.**

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 626

EVELYN TREINIES,

Petitioner,

vs.

**SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON, AND F. C. KEANE.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

To the Honorable the Supreme Court of the United States:

The undersigned on behalf of the above named petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case on November 10, 1938, and printed in 99 Fed. (2nd) 651.

Summary and Short Statement of the Matters Involved.

A more detailed statement of the facts involved will be found in the brief accompanying this petition, but suffi-

cient of the facts to indicate the questions involved will be presented now.

In 1923 the Superior Court of the State of Washington, in estate proceedings then pending before it in probate, made a final distribution of all the *inventoried* property (R. 123). The decree of distribution also provided that there be distributed in the same proportion "any other property not now known or described, which may belong to said estate * * * " (R. 285). Because it was considered valueless at the time, certain stock of the respondent Sunshine Mining Company was not inventoried as a part of the estate. Later on it became extremely valuable and is the subject of the present litigation.

In December, 1934, respondent Katherine Mason, (she and those in interest with her are hereafter referred to as the Idaho Group) petitioned in the said Washington probate proceedings that the stock mentioned be decreed to be her property by reason of a trust agreement that had been entered into between her and the assignor of the petitioner herein. This was resisted by said assignor and the Washington Superior Court, in the said probate proceedings, entered its final decree of distribution, declaring title to the stock in question to be in petitioner's assignor (R. 282-298), and restrained the Idaho Group from further litigating the matter in the courts of Washington. The estate proceedings were then formally closed and the executor discharged.

Prior to the decree of the Washington Probate Court, the Idaho Group had filed in the State Court of Idaho an action to quiet title to the stock above mentioned naming therein as defendants the petitioner herein, her assignor, John Pelkes, the Sunshine Mining Company, and others (R. 125). That case was still pending and had not been decided when the decree of the Washington Superior Court, sitting in probate, was entered.

The Superior Court of the State of Washington, while sitting in probate, is a court of general jurisdiction. (See Art. 4, Par. 6, Const. of State of Wash. and Sec. 1533 Rem. Rev. Stats.)

The Idaho Group brought prohibition proceedings in the Supreme Court of the State of Washington to restrain the Washington Superior Court from proceeding in the pending probate proceeding alleging lack of jurisdiction in the Washington courts and pleading the existence of the *Idaho* case. The Washington Supreme Court denied the petition for a writ of prohibition and upheld the jurisdiction of the Washington Superior Court (R. 291).

While the Idaho quiet title action was still pending, petitioner herein with others having similar interests (who will hereafter be referred to herein as the Washington Group) filed a suit in equity (R. 244-255) in the Superior Court of the State of Washington, for Spokane County, ancillary to, and to enforce the decree of, the Washington Superior Court, entered in probate, the probate proceedings having been previously closed. The venue of this action was subsequently changed to Yakima County on the motion of the Sunshine Mining Company, which was named as one of the defendants in the suit.

The Idaho Group proceeded with the *Idaho* case and obtained therein a decision in their favor as owners of the stock in question. The Washington Group had appeared in the *Idaho* case and denied the jurisdiction of the Idaho State courts (R. 134). The Idaho District Court decided that one-half of the stock belonged to each group (R. 165); the Supreme Court of Idaho, on appeal, decided that all of the stock belonged to the Idaho Group (R. 167, 191-192).

The result was that the Washington courts had decided that the stock belonged to the Washington Group; and the Idaho Court had decided that it belonged to the Idaho Group. Each court had had before it all of the parties

including the Sunshine Mining Company. In addition, the Washington Court in the equity action had appointed a receiver to take into his possession the stock in question (R. 9, 262). He took into his possession petitioner's certificate of stock (R. 23-24, 47-48, 55-56). Thus the indicia of ownership were actually in *custodia legis*. In each case the group from one State had denied the jurisdiction of the court of the other State.

Respondent herein, the Sunshine Mining Company, a defendant in both the Washington and Idaho suits, thereupon brought an action in the U. S. District Court of Idaho under the Federal Interpleader Act against both the Washington Group and the Idaho Group and also against Judge A. W. Hawkins of the Superior Court of Washington for Yakima County, wherein the equity case was pending, and against the Receiver appointed by that court to take into possession, and hold the title to, the stock in question (R. 1).

Petitioner herein, Judge Hawkins, and the receiver, challenged the jurisdiction of the U. S. District Court to entertain the action under the Interpleader Act (R. 15, 24, 26, 345). That court held that it had jurisdiction but also held that the Sunshine Mining Company was precluded by the Idaho State Court decision, in which it was a defendant, from bringing this interpleader action if its purpose was to upset the Idaho decision (R. 319, 336; 19 Fed. Suppl. 587). The court consequently held that the Idaho decision was determinative of the case. It utterly failed to realize that, on the same basis, it was equally precluded from attempting to upset the Washington decision.

The questions relating to the jurisdiction of the U. S. District Court under the Interpleader Act were also argued in the Circuit Court of Appeals on appeal from the U. S. District Courts' decision. The Circuit Court of Appeals upheld the jurisdiction of the District Court (R. 349) but at the same time decided that the issues of fact and law that

were necessary to be decided in the District Court in order to determine whether or not it had jurisdiction in the Interpleader suit could not be "relitigated" in the Interpleader suit because the Idaho courts had determined that the Washington courts had no jurisdiction in the premises (R. 352). The court, however, failed to decide why it discriminated against the Washington courts which had previously determined that *they had exclusive and prior jurisdiction* and that the Idaho courts had not.

Reasons for Granting the Writ.

1. The case is one of first impression, inasmuch as no effort has ever been made previously under the Interpleader Act to have a Federal Court make effective one of two opposing judgments of two different States involving the same *res* and parties.

2. The Circuit Court of Appeals refused to examine the laws of the States of Washington and Idaho and the facts upon which the courts of those States respectively based their claims of jurisdiction and their conflicting judgments concerning the same property and parties. By so refusing, the Circuit Court of Appeals

First: has initiated a procedural precedent erroneous in law, and opposed to the decisions of this Supreme Court in general, and particularly to the decision in *Pendleton v. Russell*, 144 U. S. 640; 36 L. Ed. 574, which case is cited as authority for its decision;

Secondly: it has initiated an erroneous and dangerous precedent, amounting to an absurdity, in that its decision, in effect, holds that when a Federal Court is called upon, under the Interpleader Act, to decide which of two different and opposing State court judgments has a proper jurisdictional basis or is to be adopted because of prior or exclusive juris-

diction, it need not examine the facts or laws on which the opposing claims of jurisdiction are based ("relitigate the issues") but, despite the full faith and credit clause of the U. S. Constitution (Art. IV Sec. 1), may arbitrarily adopt the decision of either of the State courts which has inquired into the jurisdiction of the other and pronounced against that jurisdiction.

We say "arbitrarily" above because, if the courts of two States have each decided that the judgment of the other was without jurisdiction, the Federal Court must examine the facts and the laws of both States in order to determine which State tribunal first acquired jurisdiction or had exclusive jurisdiction. A refusal so to examine ("relitigate the issues") and a decision in favor of one State because it declared the other without jurisdiction simply favors one State arbitrarily and is a denial of the equal protection of the laws accorded by the Fourteenth Amendment.

3. The Circuit Court of Appeals has here initiated a Federal procedure clearly erroneous and contrary to the decision of this Court in *Pendleton v. Russell*, 144 U. S. 640; 36 L. Ed. 574, and for which there is no authority.

The issue involved in both States was the title to the *res* as between the same claimants. "That issue—as to whether the Washington court had jurisdiction to render the judgment relied on by appellants—had also been raised in the Idaho suit." (See decision of the Circuit Court of Appeals reported in 99 Fed. (2d) 651.) The Circuit Court of Appeals held that "The Idaho court was empowered to determine that issue" and cited *Pendleton v. Russell*, *supra*, as authority for the statement. While the *Pendleton* case is authority for the ruling that a State court, in which full faith and credit for the judgment of another State is sought, is empowered to examine into the jurisdiction of the court of the State that rendered the judgment, it is not authority

for a ruling that that State's courts can be deprived of their jurisdiction by the erroneous fiat of the other State court.

The decision of the Circuit Court of Appeals here in question, conflicts with the *Pendleton* case in that in the latter case the Federal Courts and the Supreme Court actually examined into the facts and the laws of the opposing States and decided which State's courts were right. In other words in the *Pendleton* case the issues were "*relitigated*".

The State courts of Washington have decided that under the laws of that State a Superior court sitting in probate is a court of general jurisdiction and that it has a continuing jurisdiction of estate proceedings, and particularly of extra judicial settlements amongst heirs and devisees, until the estate is finally closed. The contrary decision of the U. S. District Court herein is in conflict with the decisions of the State of Washington where the latter should be controlling, and is a direct and unjustified interference with the judicial proceedings of a State, no Federal question being involved. (U. S. Const. Art. IV Sec. 1).

By their decisions the U. S. District Court and the Circuit Court of Appeals have directly conflicted with decisions of this Supreme Court, to wit, in the following respects:

(a) The District Court gave controlling effect to the decision of the Supreme Court of Idaho, because the U. S. Supreme Court refused to review that decision on certiorari and held that:

"The denial of a petition for writ of certiorari by United States Supreme Court is not a precedent for any other case, *but is affirmance of judgment in particular case sought to be reversed.*"

Sunshine Mining Co. v. Treinies, 19 Fed. Suppl. 587, Syllabus 8 and text p. 593. Italics ours.

This directly conflicts with this Supreme Court's decision in *United States v. Carver*, 260 U. S. 482, 490;

(b) The District Court declared that the Washington decision was without jurisdictional basis and held that:

“Under Washington Law, Superior Court sitting in probate has no continuing jurisdiction to adjudicate property of estate after it is decreed in decree of distribution (Rem. Rev. Stat. Wash. § 466, 1371, 1533)’’:

Sunshine Mining Co. v. Treinies, supra, syllabus 3.

Inasmuch as the fact was that the property claimed to have been distributed was never inventoried as part of the estate, the foregoing statement of law conflicts directly with Washington law as set out in

2 Woerner Am. Law Adm., P. 1374, 1375, 1376;

Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602;

Boardman v. Watrous, 178 Wash. 690, 35 Pac. (2d) 1106;

Rem.'s Rev. Stats., Sec. 1462, 1465;

McLaughlin v. Barnes, 12 Wash. 373, 375, 41 Pac. 62;

State ex rel. Reser v. Superior Court, 13 Wash. 25, 42 Pac. 630;

In re Dyer's Estate, 161 Wash. 498, 297 Pac. 196, 20 R. C. L. 725;

Bayer v. Bayer, 83 Wash. 430, 145 Pac. 433;

Wright v. Suydam, 79 Wash. 550, 40 Pac. 578.

It is also in conflict with the following U. S. Supreme Court cases:

Robinson v. Fair, 128 U. S. 53, 32 L. Ed. 422;

Mutual Reserve Ass'n v. Phelps, 190 U. S. 147, 47 L. Ed. 987;

Kline v. Burke Const. Co., 260 U. S. 226, 67 L. Ed. 226.

The decision of the U. S. Circuit Court of Appeals, review of which is sought here, held:

(a) That the U. S. District Court had jurisdiction under the Interpleader Act to entertain the action. That ruling is

in direct conflict with the recent case of *Worcester County Trust Co. v. Riley*, 58 S. Ct. Rep. 185, in which, in a situation similar to that in the case at bar, the use of the Interpleader Act is held to be in conflict with the Eleventh Amendment which provides that the Judicial Power of a District Court does not extend to controversies between the citizens of a State and another State. Here Judge A. W. Hawkins, as Judge of the Superior Court of Washington for Yakima County, and J. C. Cheney the receiver appointed by him, were made respondents, thus indirectly making the State of Washington a party by naming as defendants its officers who were then in control of the *res*.

(b) That, since the Idaho court was empowered to determine the issue "as to whether the Washington Court had jurisdiction to render the judgment relied on by Appellants", that issue "could not be relitigated in the Interpleader suit". This is in direct conflict with *Pendleton v. Russell*, 144 U. S. 640, 36 L. Ed. 574 (cited by the Circuit Court of Appeals); *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 91 A. L. R. 950; *Sovereign Camp, W. of the W., v. Bolen*, decided in the U. S. Supr. Ct., Nov. 7, 1938, reported in advance sheets Vol. 83 L. Ed. 58. It thereby denied to petitioner herein the equal protection of the laws accorded by the Fourteenth Amendment.

That by its adopting the Idaho court's interpretation of Washington probate law the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions;

That by deciding that the U. S. District Court had jurisdiction under the Interpleader Act, the Circuit Court of Appeals has decided an important question of general procedural law in a way probably untenable, and has decided an important question of Federal law which has not been, but should be, settled by this Court;

That in refusing to examine the jurisdictional facts and the applicable laws of Washington and Idaho ("relitigate the issues") the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8730 "Evelyn H. Treinies, Seattle-First National Bank (Spokane and Eastern Branch), Administrator with the Will Annexed of the Estate of John Pelkes, Deceased, and J. C. Cheney, as Receiver, Appellants, vs. Sunshine Mining Company, a Corporation, Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Edna B. Hanson, husband and wife, and F. C. Keane, Appellees", and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

EVELYN H. TREINIES,
By THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 626

EVELYN TREINIES,

Petitioner,

vs.

**SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON AND F. C. KEANE.**

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 99 Federal Reporter (2nd series) 651. The opinion of the District Court of the United States for the District of Idaho is reported in 19 Federal Supplement 587.

Statutes Involved.

Federal Interpleader Act (Section 24 (26) of the Judicial Code as amended Jan. 20, 1936, c. 13, § 1, 49 Stat. 1096; 28 U. S. C. A. subdivision (26) of § 41); Art. IV, par. 6, Constitution of State of Washington; § 1533 Reming-

ton's Revised Statutes of Washington; Constitution of the U. S. Article II, sec. 2, Article IV, sec. 1, and Amendments XI and XIV.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (Sec. 347 (a), Tit. 28 U. S. A. C.)

Cases Sustaining Jurisdiction.

The following cases sustain the jurisdiction of this Court in the premises: *Worcester County, etc., v. Riley*, 58 Sup. Ct. Rep. 184; *Sanders v. Armour Fertilizer Works*, 91 A. L. R. 950, 292 U. S. 190.

Assignment of Errors.

1. The Circuit Court of Appeals erred in determining that the District Court had jurisdiction of the action under the Interpleader Act.

2. The court erred in holding that the judgment of the courts of the State of Idaho was determinative of the issue of ownership, thereby ignoring the judgment of the courts of the State of Washington affecting the same subject matter and parties.

3. In an action brought under the Interpleader Act wherein it was necessary to determine which of two opposing judgments of two different States should be given effect, assuming jurisdiction in the Federal District Court so to determine, it was error for the Circuit Court of Appeals to refuse to consider the issues of fact and the applicable laws of the two States in order to determine whether they acted with or without jurisdiction.

4. The Circuit Court of Appeals and the District Court erred in not holding that for the purpose of determining

the meaning of the laws of the State of Washington the laws and the decisions of the Courts of that State must be given effect in preference to the interpretations of the courts of some other State.

5. The Circuit Court of Appeals erred in not reversing the judgment of the District Court and in failing to hold that the decisions of the Washington courts were first as to time and were prior and exclusive as to jurisdiction.

Statement of the Case.

The facts in connection with this litigation are complicated and cover a long period of time. Having in mind that this Supreme Court is interested, not so much in settling litigated questions between individuals as in settling questions which involve either a principle of Federal law or practice, a constitutional question, or an important Federal question affecting the people in general or bearing on procedural matters of general interest, we will state only facts emphasizing such points.

Proceedings were begun in the Superior Court of Washington in April, 1922, to probate the will of Amelia Pelkes, who died the owner of 30,598 shares of the capital stock of Sunshine Mining Company, a Washington corporation, having its principal place of business at Yakima, Washington.

On August 9, 1923, a decree of distribution was entered by the Superior Court, sitting in probate, distributing all of the estate "hereinafter particularly described * * * and any other property not now known or described, which may belong to said estate * * *". The estate proceedings, were, however, not closed.

We will hereafter refer to the Pelkes-Treinies litigants as the "Washington Group" and to the Masons, and those claiming under them, as the "Idaho Group".

On August 4, 1934, the Idaho Group filed an action in the courts of Idaho against the Washington Group and the Sunshine Mining Company, claiming ownership in the stock under an alleged oral agreement under which the Washington Group was claimed to have held the stock in trust for the Idaho Group. The Washington Group appeared in the Idaho action and denied the facts and the jurisdiction of the Idaho court, basing their denial of jurisdiction on the fact that the matter was still within the jurisdiction of the Washington court, sitting in probate, the estate proceedings never having been closed.

Thereupon, on December 19, 1934, the Idaho Group filed a petition in the Washington probate proceedings wherein they alleged that the executor had failed to have the proceedings closed and also that the Sunshine stock was an uninventoried and *undistributed* asset of the estate which Katherine Mason of the Idaho Group claimed to own by virtue of an alleged oral agreement of partition made subsequent to the decree of distribution in 1923. John Pelkes, the executor, opposed the petition and claimed the stock as his own under the said agreement asserting that he had in 1923 given Katherine Mason, in full settlement, the more valuable half of the property of the estate instead of the one-quarter distributed to her and that he had kept certain valueless items, including the uninventoried Sunshine stock.

The Washington court, after a hearing, awarded the Sunshine stock to Pelkes (the Washington Group) and restrained the Idaho Group from further litigating the matter in any court and finally closed the estate on May 31, 1935.

The Idaho Group petitioned the Supreme Court of Washington for a writ of prohibition to prohibit the Washington Superior Court from continuing with the *probate proceedings*, alleging lack of jurisdiction in the Washington Superior Court sitting in probate. This petition was denied and

the jurisdiction of the Washington Superior Court was sustained.

The Idaho action was then still pending and involved exactly the same issues as to the Sunshine stock as were determined in the Washington probate proceeding.

In the Idaho action, on September 28, 1935, part of the stock was adjudged to be the property of the Idaho Group, and the balance, the property of the Washington Group. On appeal, the Supreme Court of Idaho, on July 23, 1936, modified the decision and awarded ALL of the stock to the Idaho Group.

At this point we thus have a probate decree in Washington PRIOR IN DATE, AND BASED ON JURISDICTION OF THE RES and of the ESSENTIAL PARTIES IN THE WASHINGTON AND IDAHO GROUPS, declaring the Washington Group owners of the Sunshine stock and a later judgment of the Idaho court, directly to the contrary, declaring the Idaho Group owners. Each judgment was subsequently confirmed by the Supreme Court of the State in which it was rendered.

Subsequently on August 12, 1936, Pelkes (of the Washington Group) instituted an action in equity in a Washington court against the Idaho Group *and the Sunshine Mining Company*, to enforce the decree of the Washington court made in the probate proceedings. The proceedings in this equity case were pending when further action was restrained by injunction issued by the U. S. District Court in the present action. In the equity case the Washington court, through its receiver, assumed control of the stock. Technically the stock was never in the possession of the Sunshine Mining Company, although the accrued dividends were.

At this juncture the Sunshine Mining Company filed the present case which was a bill of interpleader in the United States District Court, for the District of Idaho, Northern Division, filed under the Interpleader Act, 28 U. S. C. A.

Sec. 41, subd. 26, enacted January 20, 1936. (The District Court decision is reported in 19 Fed. Supp. 587.)

The bill of interpleader included as defendants not only the Washington and Idaho Groups but also the Hon. A. W. Hawkins as Judge of the Superior Court of the State of Washington, before whom the equity case was pending, and John Cheney, the receiver appointed in that case, to take into his possession John Pelkes' interest in the stock. It prayed that they, the judge and the receiver, be restrained from performing their judicial duties with reference to the stock. Obviously this calls for an interference by a Federal court with the judicial proceedings of a State, prohibited by the Eleventh Amendment to the U. S. Constitution. It is also an effort by a corporation which has been a defendant in litigation concerning the same *res* and between the same parties in two different States, wherein diametrically opposite judgments have been rendered, to have a Federal District Court, under the Interpleader Act decide which of the two State courts' judgments must be obeyed.

The judgments of both the Washington and the Idaho courts were pleaded in the interpleader suit.

First in order of time, the Washington courts held that the Idaho courts had no jurisdiction of the SUBJECT MATTER and gave judgment in favor of the Washington Group. The Idaho courts subsequently held that the Washington courts had no jurisdiction and gave judgment in favor of the Idaho Group. Each State's courts enjoined the parties from the other State from proceeding in the courts of that other State. Each State's courts would undoubtedly punish the petitioner (Sunshine Mining Company) for a violation of its order and would endeavor to enforce its judgment unless restrained by a decree of Federal authority, provided the Federal courts had jurisdiction so to restrain.

Such protection the Sunshine Mining Company has sought by filing this action. But the Circuit Court of Appeals has

decided that "the issue * * * could not be relitigated" because one of the States (Idaho) had determined the issue. It fails to say, and, in effect, refuses to say, why Idaho's determination of the issue deserves Federal protection and Washington's does not.

The decision in the Circuit Court of Appeals said:

"The stock in controversy was formerly the property of John Pelkes and his wife, Amelia Pelkes, residents of Washington. Amelia Pelkes died testate on April 24, 1922. Her will was admitted to probate in a State Court of Washington. Being community property the stock became, for purposes of administration, a part of her estate. In the Interpleader suit, it was alleged by appellants that the stock had not been distributed, but was still in custody of the Washington court, and that, therefore, the Idaho Court had no jurisdiction to entertain the Idaho suit. The Masons denied these allegations and alleged that the stock was distributed on August 9, 1923, eleven years before the Idaho suit was commenced. That issue—as to when the stock was distributed—had been raised by Pelkes in the Idaho suit. The Idaho Court was empowered to determine that issue and did determine it in favor of the Masons, holding that the stock was distributed on August 9, 1923. *The issue thus determined could not be relitigated in the Interpleader suit.*" (Italics ours.)

The Circuit Court of Appeals said "The Idaho Court was empowered to determine that issue" and cited *Pendleton v. Russell*, 144 U. S. 640, 644, as authority. We will demonstrate hereinafter that that case is direct authority in favor of our contentions herein.

The Circuit Court of Appeals decision places the Federal jurisdiction in an absurd position. It says, in effect: "It is our duty to determine which of these opposing State Courts is correct. But we refuse to decide that question, and, since Idaho says Washington had no jurisdiction, and

since we have decided that we will not examine the facts that would determine which is right ("relitigate the issue") we decide for Idaho". Idaho's determination that Washington had no jurisdiction will be sustained because Idaho has so decided; Washington's determination that Idaho had no jurisdiction will *not* be sustained *because Idaho has so decided*. That is really the logic of the decision.

If the United States courts have jurisdiction under the Interpleader Act, then the error of the Circuit Court of Appeals lies in this: that, having the duty to determine which of two inconsistent judgments rendered in different States was entitled to full faith and credit in the territory of the other, and also to determine which judgment was entitled to recognition by the Federal courts, it failed to make an examination of the LAWS OF BOTH States and the jurisdiction FACTS of the cases, in order to determine which State, if either, had controlling jurisdiction. A decision favoring the judgment of either State WITHOUT an examination of the jurisdictional facts in both cases and the laws of both States was obviously an ARBITRARY and erroneous act, which should be reviewed by this Supreme Court for reasons of public interest hereinafter set forth, and for the reason that the U. S. District Court and the Circuit Court of Appeals have denied to the courts of the State of Washington the full faith and credit accorded them by Art. IV, sec. 1, of the U. S. Constitution.

In both the U. S. District Court and in the Circuit Court of Appeals the question of the jurisdiction of those courts to interfere with the performance of the acts of the judicial officers of the State of Washington was presented and considered. However, neither court commented on those questions.

The immunity of the exclusive jurisdiction of the courts of Washington, to impound, control and quiet title to stock

in a corporation over which it had jurisdiction, from interference either by the courts of another State or of the Federal courts was urged in both the U. S. District Court and the Circuit Court of Appeals and is not being raised for the first time here. (See Supplemental Assignment of Error filed with permission in the Circuit Court of Appeals, and Answers of Judge Hawkins and Receiver Cheney (R. 345-346).

Questions Presented.

1. The U. S. District Court held that, the Idaho Supreme Court, having the parties before it, including the petitioner in interpleader, and having adjudged the ownership of the property to be in one of the parties defendant, the petitioner in interpleader was by reason of that judgment barred from bringing the interpleader action in so far as it sought to obtain a decree contrary to the Idaho decree. The record shows that the same parties, including the petitioner in the interpleader suit, appeared before the courts of the State of Washington, which had prior and exclusive jurisdiction over the property and parties, and that a judgment contrary to the Idaho judgment was rendered by the Washington courts. Such being the case, was not the Washington judgment equally a bar to the interpleader action in so far as such action sought a decree contrary to the Washington decree?

Therefore is not this interpleader suit merely an effort to seek a judgment in a U. S. court, which, in cases involving no Federal question, has only concurrent jurisdiction with a State court, for the purpose of overruling the judgment of a State court, a proceeding clearly beyond the jurisdiction of the Federal courts and in violation of Article IV, Section 1, and also of the Eleventh Amendment to the U. S. Constitution?

The U. S. District Court, in asserting jurisdiction of the interpleader suit, relied on two erroneous findings:

First. It found that the decision of the Supreme Court of Idaho, which held that the Washington Superior Court sitting in probate was without jurisdiction to make its decree of May 31, 1935, and that exclusive jurisdiction was in itself, had been AFFIRMED by the Supreme Court of the United States BECAUSE that Court had denied a petition for a writ of *certiorari* seeking to review the Idaho Supreme Court's decision. This holding is clearly erroneous and indirectly contravenes this Court's decision in the case of *Hamilton-Brown Shoe Co. v. Woolf Bros. & Co.*, 240 U. S. 258, 60 L. Ed. 634; *U. S. v. Carver*, 260 U. S. 482, 490.

Second. It found that the decree of the Washington court sitting in probate made May 31, 1935, was without the jurisdiction of that court because the probate proceedings had been closed with the final decree of distribution entered in April, 1923. This finding is erroneous because it was made without consideration of the Washington law and because it is contrary to the decisions of the Washington courts directly deciding the very questions at issue in the *Idaho* case. Such procedure constitutes a direct denial of the right of the State of Washington in the courts of Idaho to have full faith and credit accorded to its acts and proceedings in the courts of ALL States under Art. IV, sec 1, of the Constitution of the United States.

2. The question of jurisdiction having been fully presented in both State courts, is it not the duty of the Circuit Court of Appeals to examine the facts appearing in the record and the laws of the two States involved (*i. e.* "re-litigate the issues") in order to determine whether or not the present case is properly within the jurisdiction of the District Court under the Interpleader Act?

3. Where the ownership of stock in a corporation has been adjudged to be in one party by the courts of the State of Washington and to be in a different party by the courts of Idaho, has a U. S. Court jurisdiction under the Interpleader Act to determine which of those judgments be given effect?

4. Is a corporation, which has been a defendant in the courts of Idaho which declared title to certain of its corporate stock to be in the plaintiff group, and which is also a defendant in an equity action pending in the State of Washington and brought to enforce a previous decree of the courts of Washington antedating the Idaho judgment and decreeing title to be in a different Washington group, precluded by such decree and judgment from bringing an action in the U. S. courts under the Interpleader Act designed to reverse one or the other of the said judgments or decree or to restrain the continuance of the pending equity action?

5. Can the Federal Interpleader Act be availed of to decide which of two State courts, which have decided diametrically opposite to each other concerning the same *res* and persons, is correct in its decision and, if both are correct, give relief to the petitioner under the Interpleader Act?

6. Can the Federal Interpleader Act be availed of to take out of the custody of a State court, which has properly assumed jurisdiction, and out of the custody of a receiver appointed by it, certain intangible property, by ordering certain of the respondents so to dispose of the indicia of ownership of the intangible property as to effectually deprive the State court and its receiver of their power over the property?

Summary of the Argument.

Petitioner herein claims that the Washington Superior Court, sitting in probate in the Amelia Pelkes Estate, had exclusive jurisdiction over the inventoried and uninventoried property of the estate; that this jurisdiction was a continuing one and controlled all estate matters, including agreements among distributees made after decree of distribution, until the estate was finally closed and the executor discharged. The Washington Superior Court, even if sitting in probate, was a court of general jurisdiction empowered to decide questions of title to the assets of an estate as divided by the heirs among themselves, especially when those questions are submitted to the court by the heirs themselves in the estate proceedings prior to the closing of the same.

The final decree of that court made May 31, 1935, bound all parties to the same just the same as any other judgment would and was entitled to full faith and credit in all courts. The subsequent action in equity, intended to give effect to and to aid the probate decree, was merely ancillary to the latter and a continuation of the jurisdiction of the Washington courts over the *res* and the persons.

Certain of the parties included in the Idaho Group who had appeared in the estate proceedings and received property under the distribution in 1923, had in August, 1934, brought quiet title proceedings covering the Sunshine stock which was uninventoried property of the Amelia Pelkes estate. They then voluntarily filed a petition in that estate asking the distribution to themselves of the same uninventoried Sunshine stock. It was as a result of this petition and a resulting cross petition that the Washington decree of May 31, 1935, was rendered against the Idaho Group. Subsequently this group succeeded in securing a judgment in the Idaho quiet title suit in their favor dia-

metrically opposed to the probate decree of the Washington court.

Citizens of Another State Making State Officials, Who Are Acting as Such, under Constitutional Statutes, Parties Defendant, in Effect, Make the State a Party to the Action and Thereby Violate the Eleventh Amendment to the Constitution of the United States.

Since we are primarily concerned with this case from the standpoint of the jurisdiction of the U. S. courts under the Interpleader Act we may assume, for the purpose of argument only, that both the Washington and the Idaho State courts correctly arrived at their decisions under their respective laws, trial rules and evidence presented.

We, then, have a case where a corporation, confronted with diametrically opposed judgments of the courts of Washington and Idaho respectively with reference to the disposition of certain stock and stock dividends, has brought an action in the U. S. District Court under the Federal Interpleader Act in order to have the U. S. court decide which State court's judgment it is to obey. The interpleader action seeks not only to save the petitioner the embarrassment of possible double vexation (and possible double liability) for the same debt but seeks to have the judicial officers of Washington (Judge Hawkins and Cheney, the receiver) enjoined by a Federal court from functioning as such in the matter.

The action in effect made the State of Washington a party to the litigation.

The District Court of the U. S. is not clothed with jurisdiction under the Federal Interpleader Act to accomplish either of the results sought in the action.

Assuredly a corporation or other person engaged in litigation in two different States concerning the ownership of the same *res* by different groups of claimants in the differ-

ent States cannot await the termination of the various suits and *then* avail itself of the Interpleader Act in order to reverse one of the State court decisions in absence of a Federal question involved in such decision. If, as stated by the U. S. District Court of the District of Idaho, the petitioner in intervention (the Sunshine Mining Company) is precluded by the judgment against it in the Idaho State court from bringing this interpleader suit, then it is likewise precluded from doing so by the earlier and equally definite judgment of the Washington State court sitting in probate and by the suit in equity pending in that State seeking to enforce the earlier judgment.

The Denial by the U. S. Supreme Court of a Petition for a Writ of Certiorari is not an Affirmance of the Decision Sought to be Reviewed and no Jurisdiction Can Be Based on a Contrary Assertion.

Another and important point that we will argue more at length hereinafter is this:

Even if the jurisdictional facts as to amount of claim and diversity of citizenship required under the Interpleader Act are present, the Eleventh Amendment to the Constitution of the United States prohibits the bringing into an interpleader suit, as a party respondent, of one of the States, by naming as respondents State officials (such as Judge Hawkins and the receiver Cheney), who are acting in accordance with, and enforcing the laws of, that State.

Even if it is decided that, on the pleadings, the U. S. District Court had jurisdiction in the premises, that court and the Circuit Court of Appeals should still be reversed because their decisions are based on legal conclusions directly contravening the decisions of this Supreme Court.

The District Court held that because this Supreme Court denied the Washington Group a petition for certiorari to

review the decision of the Supreme Court of Idaho wherein that court held that the Washington courts had no jurisdiction of the subject matter and parties, such denial by this Court was an affirmance of the decision sought to be reviewed. (See Syllabus #8, *Sunshine Mining Co. v. Treinies*, 19 Fed. Supplement 587.) This is clearly error.

The Decisions of the Washington Courts Must Control the Decisions of Other State and Federal Courts in Cases Involving the Interpretation of Washington Laws.

Again the U. S. District Court held that the Washington Superior Court, sitting in probate, did not have continuing jurisdiction until the estate was closed and the executor discharged, over the uninventoried assets of the estate and also supervision over extrajudicial agreements for distribution of assets made by heirs, and that the Washington court's jurisdiction was not prior and exclusive. That decision is clearly contrary to the Constitution and Statutes of the State of Washington. The jurisdiction of Washington courts is to be determined by those courts under Washington laws and decisions, and Washington courts cannot be deprived of that jurisdiction, so determined by them, by the *fiat* of the courts of a different State or by a Federal court. Despite an express stipulation to the contrary made in the Idaho (State) District Court trial, the Supreme Court of Idaho refused to recognize the force and effect of Washington laws, thereby denying the full faith and credit which Art. IV, section 1, of the United States Constitution requires each State to accord to the public acts and judicial proceedings of every other State.

Where jurisdiction of the U. S. District Court is, as in the present case, challenged on appeal to the Circuit Court of Appeals, it is necessary for that court to determine such question of jurisdiction. If, in order to determine that question it is necessary to examine the facts set forth in the

record and the laws of the two States involved (which laws were pleaded in the record), it is grievous error for the Circuit Court of Appeals to refuse to consider those facts and laws ("relitigate the issues") to decide arbitrarily in favor of the decision of one State, and to ignore that of the other State.

In so doing in the present case the Circuit Court of Appeals has denied the equal protection of the laws accorded to petitioner by section 1 of the XIV Amendment and has initiated a practice clearly subversive of the following principle announced by Mr. Justice McReynolds in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190 at 199, with reference to the Interpleader Act:

"The Statute is remedial and to be liberally construed. It is broad enough to cover any adverse claims against the proceeds of the policies, no matter on what grounds urged."

ARGUMENT.

The writ herein prayed for should be granted on either of two broad grounds: First: That the United States District Court had no jurisdiction under the Federal Interpleader Act to entertain the action. Second: If it had that jurisdiction then it and the Circuit Court of Appeals erred grievously in their decisions, the former in its interpretation of the laws of Washington and its disregard of decisions of this Supreme Court, and the latter, by its refusal to consider the facts of record and the laws of the two States involved in order to determine which State court judgment should be accorded the aid of a court of equity of the United States and by its arbitrary selection of the decision of one State court in preference to that of the other thereby violating the "equal protection of the laws" clause of the Fourteenth Amendment.

FIRST SECTION.

I.

The United States District Court had no jurisdiction to entertain this interpleader action, because;

1. By the Laws of the State of Washington the Superior Court of that State sitting in probate, had jurisdiction and control of the *res* and jurisdiction over the parties, who were voluntarily before the court. It had a continuing jurisdiction over the uninventoried assets of the estate and the extra judicial division of the same by heirs until the estate was closed and the executor discharged.

2. By its final decree (May 31, 1935) both claimants having litigated the issues before it, the Washington court, in the probate proceedings, had adjudged the ownership of the *res* in question to be in the petitioner herein. By that decision the Idaho claimant was enjoined from further litigating the question of ownership in the Washington courts, and the title to the stock in question became *res adjudicata* and could not be relitigated in a Federal court where neither fraud nor a Federal question was involved.

3. Because an interpleader action cannot be brought for the purpose of reversing the decision of a State court, in the absence of fraud, and where the State court has jurisdiction.

4. Because the inclusion of Judge Hawkins and Cheney, his receiver, in the interpleader suit as parties respondent, is an effort indirectly to interplead the State itself and therefore makes the action one by citizens of the State of Idaho against the State of Washington itself, contrary to the provisions of the Eleventh Amendment.

II.

It is the settled law in Washington that the Superior Courts sitting in probate have continuing jurisdiction after the entry of the decree of distribution; (1) To administer on additional assets of the estate first called to its attention after the entry of the decree; (2) To supervise and approve or disapprove agreements of partition between the heirs; and (3) To supervise the distribution it has ordered and to inquire into the accuracy of receipts filed by the heirs.

1. Under the laws of Washington, it is the duty of the executor to call to the attention of the court all the assets of the estate, and it is against the public policy of the State to permit heirs or executors to agree to withhold assets from administration. If the court discovers at any time prior to the final discharge of the executor that assets have been withheld from administration, it must proceed to administer upon them. It is well established that the entry of a decree of distribution in no wise affects the court's jurisdiction to administer upon newly discovered property.

2 Woerner Am. Law Adm., P. 1374, 1375, 1376;

Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602;

Boardman v. Watrous, 178 Wash. 690; 35 Pac. (2d) 1106.

See also cases listed under No. 2.

(2) The statutes of Washington specifically make it the duty of the administrator to call to the court's attention all the assets of the estate.

Rem.'s Rev. Stats., Sec. 1462, 1465.

The Superior Court sitting in probate has continuing jurisdiction to compel the executor to account for assets which it is contended he has not distributed.

McLaughlin v. Barnes, 12 Wash. 373, 375, 41 Pac. 62;

State ex Rel. Reser v. Superior Court, 13 Wash. 25, 42 Pac. 630;

In re Dyer's Estate, 161 Wash. 498, 297 Pac. 196.

(3) Under the procedure for closing estates prevailing in Washington, the court retains jurisdiction after the decree of distribution, to supervise, approve, or, if the parties cannot agree, to order partition.

Rem. Rev. Stats. Sec. 1533.

(4) Upon the death of the owner of real or personal property, his estate usually vests in two or more persons in cotenancy, or is distributed to them in undivided interests and any one of them has an absolute right to a partition.

20 R. C. L. 725, Sec. 9.

(5) Prior to the enactment of statutes conferring upon probate courts jurisdiction to make and supervise partition between heirs, it was necessary for them to resort to independent suits to convert their undivided interests into estates in severalty.

20 R. C. L. 725.

(6) Eventually to protect creditors, legatees and executors, the rule grew up that "proceedings for partition . . . should be delayed until the estate, as to the debts against it and legacies, may be found, upon adjudication, to be fully settled."

Thomas v. Thomas, 35 N. W. (Iowa) 696;

See also: *Syllabus, Beecher v. Beecher*, 43 Conn. 556;

Hubbard v. Ricart, 23 Am. Doc. (Vt.) 198.

(7) In an effort to simplify procedure, many States, including Washington, have adopted statutes which confer on courts exercising probate powers, broad jurisdiction to effect and approve partition. And these proceedings have been entertained after the entry of the decree of distribution.

(a) The contention of respondents herein is set forth in *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415 at 422, and is there held unsound, as follows:

"It is contended that its (the probate Court's) control over the estate ceased when it approved the final settlement, and, by a decree of distribution, defined the nature and extent of the interests of the heirs in the remaining estate of the decedent."

The above case held that the Circuit Court of the United States had no jurisdiction to set aside the decree of the Probate Court because of error. The case is authoritative because, while deciding a California case, the Probate Court of California exercised a jurisdiction similar to the Superior Courts of Washington sitting in probate. The *Robinson* decision held them to be courts of "superior jurisdiction".

(b) Other cases in support of this proposition are:
McCarty v. Patterson, 71 N. E. (Mass.) 112.

"The probate Court had jurisdiction of this petition (for partition) whether the estate had been settled or was in course of settlement."

In *Earl v. Rowe*, 58 Am. Dec. (Maine) 714, there was a lapse of several years after the entry of the decree of distribution before partition proceedings were instituted. It was said:

"The exercise of the power is not limited to any particular time or number of years after the estate is settled."

(8) This sequence has been adopted in the State of Washington in *Webster v. Seattle Trust Co.*, 7 Wash. 642, 33 Pac. 970. Construing a case under the old territorial laws, the court said:

“Probate Courts were authorized to partition real estate in aid of final distribution, Chap. 108 Code of 1881, and partition, in the absence of statutory provisions, is a distinct branch of equity, and yet it is quite commonly in this country within the jurisdiction of probate Courts.”

The probate code subsequently adopted gave the Washington courts the widest powers as to partition. (See Rem. Rev. Stats. 1533.) A later Washington case in which the jurisdiction of the court to make an order of partition after the decree of distribution has been entered, is *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433. The situation is thus stated by the court:

“The object of the action was (a) to vacate a decree of distribution entered in the Superior Court of King County upon a non-intervention will, and (b) to vacate a decree of partition entered in the Superior Court of Lincoln County following the decree of distribution.”

Again the court held that the lower court had jurisdiction to enter this decree. This case is a notable decision in which all the earlier provisions of the Constitution with regard to probate law and its construction as decided by the court in earlier decisions is reviewed.

(9) When analyzed, Sec. 1533 is discovered to be merely a convenient statutory method by which the probate court may enforce its decree, a power which is possessed by every court of general jurisdiction.

“Jurisdiction once acquired is not exhausted by the rendition of judgment, but continues until such judgment is satisfied, and includes the power to issue all proper process and to take all proper proceedings for its enforcement.”

15 C. J. 812.

Wright v. Suydam, 79 Wash. 550, 140 Pac. 578;

Mutual Reserve Ass'n v. Phelps, 190 U. S. 147, 47 L. Ed. 987.

The Supreme Court of Washington has twice been squarely presented with the question of whether the Superior Courts sitting in probate have continuing jurisdiction to administer further upon an estate after the entry of a decree of distribution, where it appears that the executor has not complied with the statutory requirement of filing receipts, and both times it has squarely held that they have. (See *State ex Rel. Reser v. Superior Court* and *In re Dyer's estate, supra*.)

The rule in Washington, then, is that the heirs may dispose of the property by agreement, but the property so disposed of and the agreement remain subject to the court's jurisdiction and approval until receipts are approved and the executor finally discharged; and this is indisputably the rule as to uninventoried property never called to the attention of the court, where all the parties petition the court for relief, as in the present case.

(10) Under the above powers as to the supervision of partition and in the exercise of its general jurisdictional powers, whatever view may be taken of the probate law of Washington, upon the filing of Katherine Mason's petition seeking relief in the estate of Amelia Pelkes, the court entertaining jurisdiction, inasmuch as it had full power, was further empowered to make a binding order determining the issues presented by the petition.

Kline v. Burke Const. Co., 260 U. S. 226, 67 L. Ed. 226.

(11) Since the Washington constitutional and statutory provisions and powers remain unchallenged, the basis of the decisions of the Idaho Supreme Court and of the United States District Court for Idaho is swept away. The wisdom of the decisions of the Washington courts is not open to review and the jurisdictional powers are unquestionably present, where the parties appeared in the probate proceeding and by petition, and no other proceeding in rem existed.

The interpleader action involves a collateral attack on a Washington judgment, contrary to local law, and contrary to the actual Washington decisions in the instant case, and in other cases, and, if sustained, would be a denial of the "full faith and credit" accorded by the Constitution of the United States to the acts and proceedings of the Washington courts.

III.

The Federal Interpleader Act does not authorize a citizen of one State to bring an action in a Federal court against another State.

An interpleader action under the Federal Interpleader Act cannot be brought "to compel or restrain State action". (*Worcester County Trust Co. v. Riley*, 58 Supr. Ct. Rep. 185, 187). This Court in the last cited case said "a suit nominally against individuals but restraining or otherwise affecting their action as State officers, may be in substance a suit against the State, which the constitution forbids." (Citing many cases.)

SECOND SECTION.

If it should be held that the U. S. District Court had jurisdiction to entertain the action, the decision should be reversed for the various reasons briefly above stated, namely:

I.

The District Court's holding that Washington Superior Courts sitting in probate have no continuing jurisdiction over uninventoried assets and that this theory is supported by the denial of a petition for a writ of certiorari by the United States Supreme Court is erroneous in both instances.

The U. S. District Court decided that the original decree of distribution of the Amelia Pelkes Estate on August 9,

1923, by the Washington Superior Court left that court without further jurisdiction in those proceedings. Since the estate proceedings were not closed and the court always retained jurisdiction over the extra-judicial division of unlisted assets by the heirs, which jurisdiction was sustained by the Washington courts in the same proceedings and was in accordance with the Constitution, laws and judicial decisions of that State, the U. S. District Court was in error. That has been amply shown at pages 22 to 28, inc., herein.

In this respect the U. S. District Court and also the Circuit Court of Appeals have decided an important question of local law in a way in conflict with applicable local decisions (cited at pages 28 to 33, *supra*) and for that reason their decisions should be reversed.

The U. S. District Court was probably influenced in its decision by the mistaken notion that, because the Supreme Court of Idaho had decided that the Washington court had no jurisdiction and this Supreme Court had denied petitioner a writ of certiorari to review that decision, such denial constituted an affirmance of the judgment.

This is clearly error, as this Court plainly stated in *United States v. Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co. v. Woolf Bros. & Co.*, 240 U. S. 258, 60 L. Ed. 634.

II.

The Federal Interpleader Act cannot be utilized to secure the reversal of a judgment rendered by a State court acting within its jurisdiction and no Federal question being involved.

The U. S. District Court held as follows (Syllabus 9, *Sunshine Mining Co. v. Treinies*, 19 F. Supp. 587):

“9. Where Washington court rendered decree distributing decedent's personalty and had no continuing jurisdiction, under statutes, and distributee instituted

Idaho proceeding against holders of stock, who appeared, to enforce oral trust arising out of distribution of stock, and then instituted proceeding in Washington for partition of stock, resulting in decision for holders, and Idaho Supreme Court rendered decision for distributee, and United States Supreme Court denied petition for certiorari, Idaho Supreme Court decision finally adjudicated title to stock and barred statutory interpleader action in so far as it sought to deprive distributee of title (Rem. Rev. Stat. Wash. §§ 466, 1371, 1533; 28 U. S. C. A. § 41 (26))."

The finding is based on the erroneous interpretation of the Washington laws. It, in effect, holds that if a respondent in the interpleader action has a final judgment in his favor declaring him to be the owner of the *res* in question, the judgment is "barred" from attack "in so far as it sought to deprive distributee of title", by "statutory interpleader action".

In other words the theory of the court appears to be that if the effect of the interpleader action is to deprive respondent of title under an Idaho judgment the action is barred on the same reasoning, if the Washington judgment is equally correct and conclusive and prior, as to both jurisdiction and time of rendition is not the petitioner equally barred from attacking *that* judgment "in so far as it sought to deprive the Washington distributee of title"?

We agree with the apparent conclusion of the District Court that the "statutory interpleader action" is barred if its purpose is to reverse the judgment of a State Court. THERE MUST, HOWEVER, BE NO DISCRIMINATION BETWEEN STATE COURTS.

Since the inevitable result in this action must be either the reversal of a Washington court which had adjudicated title to one group or the reversal of an Idaho court which had decreed title to another group, it would seem that, under

the logic of the decision of the District Court itself it did not have jurisdiction of the action.

If upon examination it results that the decisions of both the Washington and Idaho courts, although conflicting, were correct, then we have a condition described by this Supreme Court in the case of *Worcester County, etc., v. Riley*, 58 Sup. Ct. Rep. 185, at 188.

"But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decision of State courts shall be free from error, Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755; or require that pronouncements shall be consistent." (Italics ours.)

III.

When the record contains the evidence of the jurisdictional facts and the laws of two States whose courts have rendered opposing judgments concerning the title to the same personal property, it is the duty of the Circuit Court of Appeals, assuming that it has jurisdiction of the action, to consider and pass upon the said facts and applicable State laws in order to determine whether or not either State had jurisdiction to render its judgment.

Upon appeal, the Circuit Court of Appeals held that the District Court had jurisdiction because respondents were citizens of different States and more than \$500.00 was in controversy and deposited with the registry of the court. It did not discuss the question of the indirect involvement of

State as a party respondent nor would it consider either the facts or the laws of the two States involved by virtue of which each claimed the prior and exclusive jurisdiction to be in its own courts and denied categorically the jurisdiction of the other's courts over the *res*.

If jurisdiction lay in the U. S. District Court then the duty of the Circuit Court of Appeals was clear:

"The Court is to weigh the right or title of each claimant under the law of the State in which it arose and determine which according to equity is better." (*Sanders v. Armour Fertilizer Works*, 292 U. S. 190 at 200.)

This the Circuit Court of Appeals refused to do. It thereupon held that the Idaho courts, having a right to examine into the jurisdiction of the Washington courts and having decided against their jurisdiction, must be sustained, without consideration of the fact that the Washington courts first obtained jurisdiction, first adjudicated the title involved, and declared that the Idaho courts had no jurisdiction. This refusal to consider the facts and the laws of Washington is a grievous error and a violation of the full faith and credit to which Washington judgments are entitled under Art. IV, Sec. 1, of the U. S. Constitution.

We further assert that, assuming jurisdiction to have been in the District Court, its refusal to perform its duty as outlined by Justice McReynolds in the *Sanders* case, *supra*, was a violation of petitioner's constitutional rights to due process of law.

The questions herein discussed and the arguments presented are merely outlined, petitioner bearing in mind the requirement of Rule 38 demanding conciseness and brevity. The matters in question here are of the utmost general importance and should be decided by this Court. Counsel are prepared and desire the opportunity to present an elaborate

brief and thorough discussion of the points at issue and will do so if the writ be granted.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutional rights of petitioner be preserved; that the interpretation of local laws of the State of Washington by the Federal courts be made to harmonize with the interpretation of those laws by the Washington courts and, in order further, that the decision of the United States District Court and the Circuit Court of Appeals be made to harmonize with prior decisions of this Court, and that to said end a writ of certiorari should be granted and this Court should review the decision of the United States District Court for the District of Idaho and the decision of the U. S. Circuit Court of Appeals for the Ninth Circuit and finally reverse them.

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 626

EVELYN TREINIES,

Petitioner,

vs.

SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON, EDNA
B. HANSON AND F. C. KEANE.

**SUPPLEMENT TO PETITION FOR WRIT OF
CERTIORARI**

Since filing the petition for a writ of certiorari in the above entitled action, the case of *Asher v. Bone*, 100 F. (2d) 115, and reported in the advance sheets under date of January 30, 1939, decided in the same Circuit Court of Appeals which made the decision in the present case, has been published.

We cite the decision as being in substantial conflict with the case at bar in the following particulars, in that it holds as follows:

“The jurisdiction to determine the interest of respective claimants on an estate in Idaho is exclusively

in the probate courts of that state having jurisdiction of the proceeding and the determination thereof by such probate court, whether right or wrong, is conclusive and subject only to be reversed, set aside or modified on appeal" (317).

The record in the present case shows that the Idaho Group petitioned in the Washington probate proceedings that the stock in question be decreed to be their property. Those probate proceedings had not then been closed. By their action the Idaho Group submitted themselves to the jurisdiction of the Washington Superior Court sitting in probate. Later, challenging that court's jurisdiction, the Idaho Group sought, by prohibition proceedings in the Supreme Court of Washington, to prohibit the Washington Superior Court from proceeding with the matter. Prohibition was denied by the Supreme Court of Washington and the jurisdiction of the Superior Court consequently upheld (R. 291).

In *Asher v. Bone, supra*, one Osburn, having the requisite diversity of citizenship, had appeared in the U. S. District Court, and had objected to its jurisdiction. He, however, failed to join in the appeal to the Circuit Court of Appeals from the District Court's judgment. It was held by the Circuit Court of Appeals that, despite the fact that the U. S. District Court had no jurisdiction of the controversy, the decree of the U. S. District Court was binding on Osburn so far as it affected property distributed to him (Decision, p. 319).

The record in the present case shows that, while the probate proceedings were still open in the Washington Superior Court, the Idaho Group not only subjected themselves to the jurisdiction of that court, but were the very parties invoking such jurisdiction, and that they never appealed from the final adjudication of the Washington Courts affirming such jurisdiction.

The U. S. District Court in this present action held that it had no jurisdiction to reverse the Idaho State courts. By the same token it had no jurisdiction to reverse the Washington State courts. Nevertheless it has proceeded to make the decision of the latter court ineffective by restraining the Washington Group, who have properly objected to the U. S. District Court's jurisdiction and *have* appealed to the Circuit Court of Appeals, from proceeding to enforce their Washington judgment.

The two decisions are therefore in substantial conflict and call for the exercise of the supervising powers of this Supreme Court.

San Francisco, California, February 10th, 1939.

Respectfully submitted,

THOS. D. AITKEN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

FILED
JUN 20 1939

CHARLES ELMORE GROPLEY
CLERK

No. 4

EVELYN TREINIES,

Petitioner,

vs.

**SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON AND F. C. KEANE.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

PETITIONER'S OPENING BRIEF.

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 4

EVELYN TREINIES,

Petitioner,

vs.

**SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON AND F. C. KEANE.**

PETITIONER'S OPENING BRIEF.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 99 Federal Reporter (2nd series) 651. The opinion of the District Court of the United States for the District of Idaho is reported in 19 Federal Supplement 587.

Statutes Involved.

Federal Interpleader Act (Section 24 (26) of the Judicial Code as amended Jan. 20, 1936, c. 13, § 1, 49 Stat. 1096; 28 U. S. C. A. subdivision (26) of § 41); Art. IV, par. 6,

Constitution of State of Washington; § 1533, Remington's Revised Statutes of Washington; Constitution of the U. S., Article II, sec. 2; Article IV, sec. 1; and Amendments XI and XIV.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)).

Cases Sustaining Jurisdiction.

The following cases sustain the jurisdiction of this Court in the premises: *Worcester County, etc., v. Riley*, 302 U. S. 292, 85 L. Ed. 268, 58 Sup. Ct. Rep. 184; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 78 L. Ed. 543, 91 A. L. R. 950.

Assignment of Errors.

1. The Circuit Court of Appeals erred in determining that the District Court had jurisdiction of the action under the Interpleader Act.

2. The court erred in holding that the judgment of the courts of the State of Idaho was determinative of the issue of ownership, thereby ignoring the judgment of the courts of the State of Washington affecting the same subject matter and parties.

3. In an action brought under the Interpleader Act wherein it was necessary to determine which of two opposing judgments of two different States should be given effect, assuming jurisdiction in the Federal District Court so to determine, it was error for the Circuit Court of Appeals to refuse to consider the issues of fact and the applicable laws of the two States in order to determine whether they acted with or without jurisdiction.

4. The Circuit Court of Appeals and the District Court erred in not holding that, for the purpose of determining the meaning of the laws of the State of Washington, the laws and the decisions of the courts of that State must be given effect in preference to the interpretation of those laws by the courts of some other State.

5. The Circuit Court of Appeals erred in not reversing the judgment of the District Court and in failing to hold that the decisions of the Washington courts were first as to time and prior and exclusive as to jurisdiction.

Statement of the Case.

The facts in connection with this litigation are complicated and cover a long period of time. Having in mind that this Supreme Court is interested, not so much in settling litigated questions between individuals as in settling questions which involve either a principle of Federal law or practice, a constitutional question, or an important Federal question affecting the people in general or bearing on procedural matters of general interest, we shall state only facts emphasizing such points.

The printed record herein, embracing proceedings in not less than seven different courts, is so voluminous, that, as is readily seen, this Court, and the attorneys herein, may easily become so led astray in a mass of immaterial matter, as entirely to lose sight of the salient points of the present case. Counsel for petitioner firmly believe that the lower courts involved herein, because of the confusion mentioned above, lost sight of the material points of the case. Having the foregoing considerations in mind, counsel for petitioner herein proposed a record which they thought fair to both parties herein, and calculated to present clearly to this Court all essential questions at issue herein. Respondents, however, insisted on their right to include in the record

a mass of material which counsel for petitioner believed totally unnecessary to present such issue, because tending merely to provoke comment in the proceedings of the trial and Supreme Courts of the two States concerned, and to becloud the issues presented in this present petition.

In *Asher v. Bone*, 100 F. (2d) 315, 317, the United States Circuit Court of Appeals, referring to certain proceedings in a State trial court, held: that "errors . . . occurred in the . . . proceedings that would have called for a reversal on a direct appeal" but also held that, nevertheless, "it is not for this Court to correct its error" (i.e., the error of the State trial court), and also held that "the determination . . . by such . . . Court (i.e., the State trial court), whether right or wrong, is conclusive and subject only to be reversed, set aside or modified on appeal".

Counsel for petitioner therefore, in this brief, will adhere to the principles expressed in *Asher v. Bone*, *supra*, and will not permit themselves to be sidetracked into commenting on any act, or proceeding, of either the Washington or Idaho trial or Supreme Courts, not germane to the Federal questions involved in this petition.

Proceedings were begun in the Superior Court of Washington in April, 1922, to probate the will of Amelia Pelkes, a resident of that State, who died the owner of 30,598 shares of the capital stock of Sunshine Mining Company, a Washington corporation, having its principal place of business at Yakima, Washington (R. 263-265, inc.). This and all subsequent references are to printed pages of the Transcript of Record herein.

On August 9, 1923, a decree of distribution was entered by the said Superior Court, sitting in probate, distributing all of the estate "hereinafter particularly described . . . and any other property not now known or described, which

may belong to said estate * * * The estate proceedings were, however, not closed (R. 123).

The present controversy concerns only 15,299 shares of the Sunshine Mining Company stock.

We shall hereafter refer to the Pelkes-Treinies litigants as the "Washington Group" and to the Masons, and those claiming under them, as the "Idaho Group".

On August 4, 1934, the Idaho Group filed an action in the Courts of Idaho against the Washington Group and the Sunshine Mining Company (R. 126), claiming ownership in the remaining 15,299 shares of stock under an alleged oral agreement under which the Washington Group was claimed to have held the stock in trust for the Idaho Group. The Washington Group appeared in the Idaho action and denied the facts and the jurisdiction of the Idaho Court, basing their denial of jurisdiction on the fact that the matter had originally been and still was within the jurisdiction of the Washington Court, sitting in probate, the estate proceedings never having been closed. (See Findings of Fact and Conclusions of Law, Idaho State District Court, R. 152-165; Opinion of Idaho Supreme Court, R. 167-192.)

Thereupon, on December 19, 1934, the Idaho Group filed a petition in the Washington probate proceedings wherein they alleged that the executor had failed to have the proceedings closed and also that the Sunshine stock was an uninventoried and *undistributed* asset of the estate which Katherine Mason of the Idaho Group claimed to own by virtue of an alleged oral agreement of partition made subsequent to the decree of distribution in 1923. They prayed for

"the removal of John Pelkes as executor * * * and the appointment of an administrator * * * to complete the administration of the estate." (R. 288 par. 9.)

John Pelkes, the executor, opposed the petition and claimed the stock as his own under the said agreement, asserting that

he had in 1923 given Katherine Mason, in full settlement, the more valuable half of the property of the estate instead of the one-quarter distributed to her and that he had kept certain valueless items, including all of the uninventoried Sunshine stock. (R. 290 par. 10.)

Despite their said petition in the Washington probate proceedings, the Idaho Group petitioned the Supreme Court of Washington for a writ of prohibition to prohibit the Washington Superior Court from continuing with the *probate proceedings*, alleging lack of jurisdiction in the Washington Superior Court, sitting in probate, and asserting sole jurisdiction in the Idaho courts. This petition was denied; the jurisdiction of the Washington Superior Court was sustained; that of the Idaho court was denied. (See Answer of Judge Hawkins, R. 15, *et seq.*)

Thereafter the Washington Superior Court, after a hearing, awarded the Sunshine stock to Pelkes' transferee, Evelyn Treinies, petitioner herein (the Washington Group), restrained the Idaho Group from further litigating the matter in any court (R. 291 par. 11), and finally closed the estate, on May 31, 1935. (R. 282, 298.) No appeal was taken by the Idaho Group.

The Idaho action was then still pending and involved exactly the same issues as to the Sunshine stock as had been determined in the Washington probate proceeding.

In the Idaho action, on September 28, 1935, part of the stock was adjudged to be the property of the Idaho Group, and the balance, the property of the Washington Group. On appeal, the Supreme Court of Idaho, on July 23, 1936, modified the decision and awarded ALL of the stock to the Idaho Group. Each of the Idaho courts considered the jurisdiction of the Washington court, and denied it. (See Opinion, Idaho Supreme Court, R. 167; also R. 347, 352.)

At this point, accordingly, we have a probate decree in Washington, PRIOR IN DATE, AND BASED ON PRIOR JURISDIC-

TION OF THE RES AND OF THE ESSENTIAL PARTIES IN THE WASHINGTON AND IDAHO GROUPS, declaring the Washington Group owners of the Sunshine stock, and a later judgment, based on a later jurisdiction, of the Idaho court, directly to the contrary, declaring the Idaho Group owners. In each state the jurisdictional points were passed on by the state's Supreme Court either before or after the judgment, and the courts of each state considered, and denied, the jurisdiction of the courts of the other state.

Subsequently on August 12, 1936, Pelkes (of the Washington Group) instituted an action in equity in the Washington Superior Court against the Idaho Group and the *Sunshine Mining Company*, to enforce the decree of the Washington Court made in the probate proceedings. (R. 244.) Pelkes having died, the administrator of his estate was substituted in his stead as plaintiff and an amended complaint was filed. (R. 256.) The proceedings in this equity case were pending when further action was restrained by injunction issued by the U. S. District Court in the present action. In the equity case the Washington court, through its receiver, assumed control of the stock. (See Answer of Judge Hawkins, R. 17, 24; Answer of Cheney, Receiver, R. 46, 49(2).) Technically the stock was never in the possession of the Sunshine Mining Company, although the accrued dividends were.

At this juncture the Sunshine Mining Company filed the present action which was a bill of interpleader in the United States District Court for the District of Idaho, Northern Division, filed under the Interpleader Act, 28 U. S. C. A. Sec. 41, subd. 26, enacted January 20, 1936. (R. 1.) (The District Court decision is reported in 19 Fed. Supp. 587.)

The bill of interpleader included as defendants not only the Washington and Idaho Groups, but also the Hon. A. W. Hawkins, as Judge of the Superior Court of the State of Washington, before whom the equity case was pending,

John Cheney, the receiver appointed in that case, to take into his possession petitioners' interest in the stock, and Seattle First National Bank, administrator of the estate of John Pelkes, deceased. It prayed that they, the judge, the receiver and the administrator, be restrained from performing their judicial duties with reference to the stock. Obviously such procedure is an interference by a Federal court with the judicial proceedings of a state, prohibited by the Eleventh Amendment to the U. S. Constitution. It is also an effort by a corporation which has been a defendant in litigation concerning the same res and between the same parties in two different states, wherein diametrically opposite judgments have been rendered, to have a Federal District Court, under the Interpleader Act, decide which of the two state courts' judgments must be obeyed.

The judgments of both the Washington (R. 6(16)) and the Idaho Courts (R. 3(11)) were pleaded in the interpleader suit.

First in order of time, and on the basis of a prior jurisdiction, the Washington Courts held that the Idaho Courts had no jurisdiction of the SUBJECT MATTER and gave judgment in favor of the Washington Group. (See Judge Lindsley's Findings and Order Approving Partition, etc. R. 282, 292; p. 14 of order.) The Idaho courts subsequently held that the Washington courts had no jurisdiction and gave judgment in favor of the Idaho Group. (R. 152; R. 167; R. 192) Each State's courts enjoined the parties from the other State from proceeding in the courts of that other State. Each State's courts would undoubtedly punish the petitioner (Sunshine Mining Company) for a violation of its order and would endeavor to enforce its judgment unless restrained by a decree of Federal authority, provided the Federal courts had jurisdiction so to restrain.

Such protection the Sunshine Mining Company has sought by filing this action. But the Circuit Court of Ap-

peals on the appeal herein has decided that "the issue . . . could not be relitigated" because *one of the States* (Idaho) had determined the issue. It fails to say, and, in effect, refuses to say, why Idaho's determination of the issue deserves Federal protection and Washington's does not.

The decision in the Circuit Court of Appeals said:

"The stock in controversy was formerly the property of John Pelkes and his wife, Amelia Pelkes, residents of Washington. Amelia Pelkes died testate on April 24, 1922. Her will was admitted to probate in a State Court of Washington. Being community property the stock became, for purposes of administration, a part of her estate. In the Interpleader suit, it was alleged by appellants that the stock had not been distributed, but was still in custody of the Washington court, and that, therefore, the Idaho Court had no jurisdiction to entertain the Idaho suit. The Masons denied these allegations and alleged that the stock was distributed on August 9, 1923, eleven years before the Idaho suit was commenced. That issue—as to when the stock was distributed—had been raised by Pelkes in the Idaho suit. The Idaho Court was empowered to determine that issue and did determine it in favor of the Masons, holding that the stock was distributed on August 9, 1923. *The issue thus determined could not be relitigated in the Interpleader suit.*" (Italics ours.)

The Circuit Court of Appeals said "The Idaho Court was empowered to determine that issue" and cited *Pendleton v. Russell*, 144 U. S. 640, 644, as authority. We will demonstrate hereinafter that that case is direct authority in favor of our contentions herein.

The Circuit Court of Appeals' decision places the Federal jurisdiction in an absurd position. It says, in effect:

"It is our duty to determine which of these opposing state courts is correct. But we refuse to decide that question, and, since Idaho says Washington had no jurisdiction, and since we have decided that we will not examine the facts that would determine which state

is right ('relitigate the issue') we decide for Idaho. Idaho's determination that Washington had no jurisdiction will be sustained because Idaho has so decided; Washington's determination that Idaho had no jurisdiction will *not* be sustained *because Idaho has so decided.*"

That is really the logic of the decision.

If the United States courts have jurisdiction under the Interpleader Act, then the error of the Circuit Court of Appeals lies in this: that, having the duty to determine which of two inconsistent judgments rendered in different States was entitled to full faith and credit in the territory of the other, and also to determine which judgment was entitled to recognition by the Federal courts, it failed to make an examination of the LAWS OF BOTH States and the jurisdictional FACTS of the cases, in order to determine which State, if either, had controlling jurisdiction. A decision favoring the judgment of either State WITHOUT an examination of the jurisdictional facts in both cases and the laws of both States was obviously an ARBITRARY and erroneous act, which should be reversed by this Supreme Court, because by their decisions herein complained of the U. S. District Court and Circuit Court of Appeals have denied to the Courts of the State of Washington the full faith and credit accorded them by Art. IV, Sec. 1 of the U. S. Constitution.

In both the U. S. District Court and the Circuit Court of Appeals the question of the jurisdiction of those courts to interfere with the performance of the acts of the judicial officers of the State of Washington was presented and considered. However, neither court commented on those questions.

The immunity of the exclusive jurisdiction of the courts of Washington, to impound, control and quiet title to stock in a corporation over which it had jurisdiction, from interference either by the courts of another State or of the Fed-

eral courts, was urged in both the U. S. District Court and the Circuit Court of Appeals and is not being raised for the first time here. (See Supplemental Assignment of Error, filed with permission in the Circuit Court of Appeals (R. 345), and Answers of Judge Hawkins (R. 15, 24(b)) and Receiver Cheney, (R. 46).

Questions Presented.

1. The U. S. District Court held that, because the Idaho Supreme Court, had the parties before it, including the petitioner in interpleader, and had adjudged the ownership of the property to be in one of the parties defendant, the petitioner in interpleader was by reason of that judgment barred from bringing the interpleader action in so far as it sought to obtain a decree contrary to the Idaho decree. The record shows that the same parties, including the petitioner in the interpleader suit, appeared before the courts of the State of Washington, which had prior and exclusive jurisdiction over the property and parties, and that a judgment contrary to the Idaho judgment was rendered by the Washington courts. Such being the case, was not the Washington judgment equally a bar to the interpleader action in so far as such action sought a decree contrary to the Washington decree?

Therefore is not this interpleader suit merely an effort to seek a judgment in a U. S. court, which, in cases involving no Federal question, has only concurrent jurisdiction with a State court, for the purpose of overruling the judgment of a State court, a proceeding clearly beyond the jurisdiction of the Federal courts and in violation of Article IV, Section 1, and also of the Eleventh Amendment to the U. S. Constitution?

The U. S. District Court, in asserting jurisdiction of the interpleader suit, relied on two erroneous findings.

FIRST. It found that the decision of the Supreme Court of Idaho, which held that the Washington Superior Court, sitting in probate, was without jurisdiction to make its decree of May 31, 1935, and that exclusive jurisdiction was in itself, had been **AFFIRMED** by the Supreme Court of the United States **BECAUSE** that court had denied a petition for a writ of certiorari seeking to review the Idaho Supreme Court's decision. This holding is clearly erroneous and indirectly contravenes this court's decision in the case of *Hamilton-Brown Shoe Co. v. Woolf Bros. & Co.*, 240 U. S. 258; 60 L. Ed. 634; *U. S. v. Carver*, 260 U. S. 482, 490.

SECOND. It found that the decree of the Washington court sitting in probate, made May 31, 1935, was without the jurisdiction of that court because the probate proceedings had been closed with the final decree of distribution entered in April, 1923. This finding is erroneous because it was made without consideration of the Washington law and because it is contrary to the decisions of the Washington courts directly deciding the very question in point. Such procedure constitutes a direct denial of the right of the State of Washington to have full faith and credit accorded by the courts of Idaho to its acts and proceedings in the courts of **ALL** States under Art. IV, sec. 1 of the Constitution of the United States.

2. The question of jurisdiction having been fully presented in both State courts, is it not the duty of the Circuit Court of Appeals to examine the facts appearing in the record and the laws of the two States involved (i. e. "relitigate the issues") in order to determine whether or not the present case is properly within the jurisdiction of the U. S. District Court under the Interpleader Act?

3. Where the ownership of stock in a corporation has been adjudged to be in one party by the courts of the State of Washington and to be in a different party by the courts

of Idaho, has a Federal court jurisdiction, under the Interpleader Act, to determine which of those judgments shall be given effect?

4. Is a corporation, which has been a defendant in the courts of Idaho which declared title to certain of its corporate stock to be in the plaintiff group, and which is also a defendant in an equity action pending in the State of Washington and brought to enforce a previous decree of the courts of Washington antedating the Idaho judgment and decreeing title to be in a different Washington Group, precluded by such decree and judgment from bringing an action in the Federal courts under the Interpleader Act designed to reverse one or the other of the said judgments or decrees or to restrain the continuance of the pending equity action?

5. Can the Federal Interpleader Act be availed of to decide which of two State courts, which have decided diametrically opposite to each other concerning the same res and persons, is correct in its decision, and, if both are correct, to give relief to the petitioner under the Interpleader Act?

6. Can the Federal Interpleader Act be availed of to take out of the custody of a State court, which has properly assumed jurisdiction, and out of the custody of a receiver appointed by it, certain intangible property, by ordering certain of the respondents so to dispose of the indicia of ownership of the intangible property as effectually to deprive the State court and its receiver of their power over the property?

Summary of the Argument.

Petitioner herein claims that the Washington Superior Court, sitting in probate in the Amelia Pelkes Estate, had exclusive jurisdiction over the inventoried and uninven-

toried property of the estate; that this jurisdiction was a continuing one and controlled all estate matters, including agreements among distributees made after decree of distribution, until the estate was finally closed and the executor discharged. The Washington Superior Court, even if sitting in probate, was a court of general jurisdiction empowered to decide questions of title to the assets of an estate as divided by the heirs themselves, especially when those questions were submitted to the Court by the heirs themselves in the estate proceedings prior to the closing of the same.

The final decree of that court made May 31, 1935 (R. 282) bound all parties to the same just the same as any other judgment would, and was entitled to full faith and credit in all courts. The subsequent action in equity, intended to give effect to and to aid the probate decree, was merely ancillary to the latter and a continuation of the jurisdiction of the Washington courts over the *res* and the persons.

Certain of the parties included in the Idaho Group who had appeared in the Washington estate proceedings and received property under the distribution in 1923, had, in August 1934, brought quiet title proceedings covering the Sunshine stock which was uninventoried property of the Amelia Pelkes estate. They then, in December, 1934, voluntarily filed a petition in that estate proceeding asking the distribution to themselves of the same uninventoried Sunshine stock. It was as a result of this petition and a resulting cross petition that the Washington decree of May 31, 1935 was rendered against the Idaho Group. Subsequently this group succeeded in securing a judgment in the Idaho quiet title suit in their favor diametrically opposed to the probate decree of the Washington court.

CITIZENS OF ANOTHER STATE MAKING STATE OFFICIALS, WHO ARE ACTING AS SUCH UNDER CONSTITUTIONAL STATUTES, PARTIES DEFENDANT, IN EFFECT MAKE THE STATE A PARTY TO THE ACTION AND THEREBY VIOLATE THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Let us assume that both the Washington and the Idaho State Courts correctly arrived at their decisions under their respective laws, trial rules and evidence presented. We, then, have a case where a corporation, confronted with diametrically opposed judgments of the courts of Washington and Idaho respectively with reference to the disposition of certain stock and stock dividends, has brought an action in the U. S. District Court under the Federal Interpleader Act in order to have the U. S. Court decide which state court's judgment it is to obey. The interpleader action seeks not only to save the petitioner the embarrassment of possible double vexation (and possible double liability) for the same debt but seeks to have the judicial officers of Washington (Judge Hawkins, Cheney, the receiver and the Seattle First National Bank as administrator) enjoined by a federal court from functioning as such in the Washington proceedings.

The action, in effect, made the State of Washington a party to the litigation.

The U. S. District Court is not clothed with jurisdiction under the Federal Interpleader Act to accomplish either of the results sought in the interpleader action.

Assuredly, a corporation or other person engaged or interested in litigation in two different States concerning the ownership of the same res by different groups of claimants in the different States cannot await the termination of the various suits and *then* avail itself of the Interpleader Act in order to reverse one of the State court decisions in the absence of a Federal question involved in such

decision. If, as stated by the U. S. District Court, the petitioner in intervention (the Sunshine Mining Company) is precluded by the judgment against it in the Idaho State court from bringing this interpleader suit, then it is likewise precluded from doing so by the earlier and equally definite judgment of the Washington State court sitting in probate and by the suit in equity pending in that State seeking to enforce the earlier judgment.

THE DENIAL BY THE U. S. SUPREME COURT OF A PETITION FOR A WRIT OF CERTIORARI IS NOT AN AFFIRMANCE OF THE DECISION SOUGHT TO BE REVIEWED AND NO JURISDICTION CAN BE BASED ON A CONTRARY ASSERTION.

Another and important point that we will argue more at length hereinafter is this:

Even if the jurisdictional facts as to amount of claim and diversity of citizenship required under the Interpleader Act are present, the Eleventh Amendment to the Constitution of the United States prohibits bringing one of the States into an interpleader suit, as a party respondent, by naming as respondents officials of that State, (such as Judge Hawkins, the receiver Cheney, and the administrator, in so far as such procedure interferes with his administration of the estate) who are acting in accordance with, and enforcing the laws of, that State.

Even if it is decided that, on the pleadings, the U. S. District Court had jurisdiction in the premises, that court and the Circuit Court of Appeals should still be reversed because their decisions are based on legal conclusions directly contravening the decisions of this Supreme Court.

The U. S. District Court in the present case based its decision largely upon the proposition that because this Supreme Court denied the Washington Group a petition for certiorari to review the decision of the Supreme Court of Idaho wherein that court held that the Washington courts had no jurisdiction of the subject matter and parties,

such denial by this Court was an affirmance of the decision of the Supreme Court of Idaho sought to be reviewed. (See Syllabus #8 *Sunshine Mining Company v. Treinies*, 19 Fed. Supplement 587.) This is clearly error.

THE DECISIONS OF THE WASHINGTON COURTS MUST CONTROL THE DECISIONS OF OTHER STATE AND FEDERAL COURTS IN CASES INVOLVING THE INTERPRETATION OF WASHINGTON LAWS.

Again, the U. S. District Court held that the Washington Superior Court, sitting in probate, did not have jurisdiction, continuing until the estate was closed and the executor discharged, over the uninventoried assets of the estate and also supervision over extrajudicial agreements for distribution of assets made by heirs, and that the Washington court's jurisdiction was not prior and exclusive. That decision is clearly contrary to the constitution and statutes of the State of Washington. The jurisdiction of Washington courts is to be determined under Washington laws as interpreted in the decisions of the highest court of Washington, and Washington courts cannot be deprived of their jurisdiction, by the fiat of the courts of a different State or by a Federal court in disregard of the Washington laws so interpreted. An express stipulation was made in the Idaho State District Court trial, as follows:

"that the trial court, and the Supreme Court on appeal, should take judicial notice of the laws of Washington, whether embodied in statutes or judicial decisions, to the same extent and with the same effect that a Federal court would." (See Opinion of Idaho Supreme Court in *Mason v. Pelkes*, 57 Idaho 10, 59 Pac. (2d) 1087; R. 186.)

Despite the stipulation, the Supreme Court of Idaho positively refused to recognize the force and effect of Washington laws, thereby denying the full faith and credit which Art. IV section 1 of the United States Constitution requires each State to accord to the public acts and judicial proceedings of every other State.

Where jurisdiction of the U. S. District Court is, as in the present case, challenged on appeal to the Circuit Court of Appeals, it is necessary for that court to determine such question of jurisdiction. If, in order to determine that question it is necessary to examine the facts set forth in the records of the cases in the two States and laws of those two States, which laws were pleaded in the record (R. 63-91 inc., R. 150-151) and of which laws the Federal courts take judicial knowledge, it is grievous error for the Circuit Court of Appeals to refuse to consider those facts and laws ("relitigate the issues"), to decide arbitrarily in favor of the decision of one State, and to ignore that of the other State.

In so doing in the present case, the Circuit Court of Appeals has denied the equal protection of the laws accorded petitioner by Section 1 of the Fourteenth Amendment and has initiated a practice clearly subversive of the following principle announced by Mr. Justice McReynolds in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, at 199, 78 L. Ed. 543, 91 A. L. R. 950, with reference to the Interpleader Act:

"The Statute is remedial and to be liberally construed. It is broad enough to cover any adverse claims against the proceeds of the policies, no matter on what grounds urged."

ARGUMENT.

There are two different and distinct phases to the problem before the court.

The first question is:

Did the U. S. District Court have jurisdiction to entertain the interpleader action?

The second question is:

Assuming that the U. S. District Court had jurisdiction, did that court and the Circuit Court of Appeals give to the decision of the Washington State court the full faith and credit required by Art. IV, Sec. 1, of the U. S. Constitution.

Whichever horn of the dilemma this Court seizes we believe must lead to a reversal of the U. S. District Court and the Circuit Court of Appeals.

Underlying both phases of the problem is the question of the jurisdiction of the Superior Court of Spokane County, Washington, sitting in probate, to make the decree of May 31, 1935 (R. 282), whereby it decided that the title to the 15,299 shares of Sunshine Mining Company stock and the dividends corresponding to the same belonged to petitioner's assignor, John Pelkes.

First Proposition.

The United States District Court and Circuit Court of Appeals erred in their interpretation of the Washington State Probate Law and in failing to follow that State's Probate Laws as determined generally by its statutes and court decisions, and as specially determined by its courts in the present litigation.

A.

IT IS THE SETTLED LAW IN WASHINGTON THAT THE SUPERIOR COURT SITTING IN PROBATE HAS CONTINUING JURISDICTION AFTER THE ENTRY OF THE DECREE OF DISTRIBUTION; (1) TO ADMINISTER ON ADDITIONAL ASSETS OF THE ESTATE FIRST CALLED TO ITS ATTENTION AFTER THE ENTRY OF THE DECREE; (2) TO SUPERVISE AND APPROVE OR DISAPPROVE AGREEMENTS OF PARTITION BETWEEN THE HEIRS; AND (3) TO SUPERVISE THE DISTRIBUTION IT HAS ORDERED AND TO INQUIRE INTO THE ACCURACY OF RECEIPTS FILED BY THE HEIRS, ALL OF WHICH RESULTS IN A CONTINUING AND EXCLUSIVE JURISDICTION OVER THE ASSETS OF THE ESTATE FROM THE DATE WHEN PROBATE PROCEEDINGS COMMENCE UNTIL THE EXECUTOR IS DISCHARGED AND THE ESTATE IS FINALLY CLOSED.

The applicable sections of the Washington Constitution and the Washington laws are set out fully at pages 63 to 67 of the Transcript of Record, also pages 147 to 151, inc.

(1) Under the laws of Washington, it is the duty of the executor to call to the attention of the court all the assets of the estate, and it is against the public policy of the State to permit heirs or executors to agree to withhold assets from administration. If the court discovers at any time prior to the final discharge of the executor that assets have been withheld from administration, it must proceed to administer upon them. It is well established that the entry of a decree of distribution in no wise affects the court's jurisdiction to administer upon newly discovered property.

2 Woerner Am. Law. Adm., p. 1374, 1375, 1376;

Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602;

Boardman v. Watrous, 178 Wash. 690, 35 Pac. (2d) 1106;

See also cases listed under No. (2), following:

(2) The statutes of Washington specifically make it the duty of the administrator to call to the Court's attention all the assets of the estate.

Rem.'s Rev. Stat., Sec. 1462, 1465.

The Superior Court sitting in probate has continuing jurisdiction to compel the executor to account for assets which it is contended he has not distributed.

McLaughlin v. Barnes, 12 Wash. 373, 375; 41 Pac. 62;

State ex rel. Reser v. Superior Court, 13 Wash. 25; 42 Pac. 630;

In re Dyer's Estate, 161 Wash. 498; 297 Pac. 196.

(3) Under the procedure for closing estates prevailing in Washington, the court retains jurisdiction after the decree of distribution, to supervise, approve, or, if the parties cannot agree, to order, partition.

Rem. Rev. Stats., Sec. 1533.

(4) Upon the death of the owner of real or personal property, his estate usually vests in two or more persons

in co-tenancy, or is distributed to them in undivided interests, and any one of them has an absolute right to a partition.

20 R. C. L. 725, Sec. 9.

(5) Prior to the enactment of statutes conferring upon probate courts jurisdiction to make and supervise partition between heirs, it was necessary for them to resort to independent suits to convert their undivided interests into estates in severalty.

20 R. C. L. 725.

(6) Eventually, to protect creditors, legatees and executors, the rule grew up that "proceedings for partition * * * should be delayed until the estate, as to the debts against it and legacies, may be found, upon adjudication, to be fully settled."

Thomas v. Thomas, 35 N. W. (Iowa) 696;

See also: Syllabus, *Beecher v. Beecher*, 43 Conn. 556;

Hubbard v. Ricart, 23 Am. Dec. (Vt.) 198.

(7) In an effort to simplify procedure, many States, including Washington, have adopted statutes which confer on courts exercising probate powers, broad jurisdiction to effect and approve partition. Such proceedings have been entertained after the entry of the decree of distribution—

(a) The contention of respondents herein is set forth in *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415, at 422, and is there held unsound, as follows:

"It is contended that its (the probate court's) control over the estate ceased when it approved the final settlement, and, by a decree of distribution, defined the nature and extent of the interests of the heirs in the remaining estate of the decedent."

The above case held that the Circuit Court of the United States had no jurisdiction to set aside the decree of the pro-

bate court because of error. Although the case arose in California, it is authoritative here because the probate courts of California are authorized to exercise a jurisdiction similar to that of the superior courts of Washington sitting in probate with this distinction, that while under the California statute at the present time a final decree of distribution winds up the estate proceedings, it does not do so in Washington. Notwithstanding that difference this Supreme Court in the Robinson case refused to interfere in a matter where partition was made after final distribution in the probate proceedings, on the ground that the error did not go to the jurisdiction of the probate court. The Robinson decision held the probate courts to be courts of "superior jurisdiction".

(b) Other cases in support of this proposition are *McCarty v. Patterson*, 71 N. E. (Mass.) 112:

"The probate Court had jurisdiction of this petition (for partition) whether the estate had been settled or was in course of settlement."

In *Earl v. Rowe*, 58 Am. Dec. (Maine) 714, there was a lapse of several years after the entry of the decree of distribution before partition proceedings were instituted. It was said:

"The exercise of the power is not limited to any particular time or number of years after the estate is settled."

(8) The foregoing sequence has been adopted in the State of Washington, in *Webster v. Seattle Trust Co.*, 7 Wash. 642; 33 Pac. 970. Construing a case under the old territorial laws, the Court said:

"Probate courts were authorized to partition real estate in aid of final distribution, Chap. 108 Code of 1881, and partition, in the absence of statutory provisions, is a distinct branch of equity, and yet it is quite commonly in this country within the jurisdiction of probate courts."

The Probate Code subsequently adopted gave the Washington courts the widest powers as to partition. (See Rem. Rev. Stats. 1533.) A later Washington case in which the jurisdiction of the court to make an order of partition after the decree of distribution had been entered, is *Bayer v. Bayer*, 83 Wash. 430; 145 Pac. 433. The situation is thus stated by the court:

“The object of the action was (a) to vacate a decree of distribution entered in the Superior Court of King County upon a non-intervention will, and (b) to vacate a decree of partition entered in the Superior Court of Lincoln County following the decree of distribution.”

Again the Washington Supreme Court held that the lower court had jurisdiction to enter this decree. This case is a notable decision in which all the earlier provisions of the Washington Constitution with regard to probate law and its construction, as decided by the court in earlier decisions, are reviewed.

(9) When analyzed, Sec. 1533 is discovered to be merely a convenient statutory method by which the probate court may enforce its decree, a power which is possessed by every court of general jurisdiction.

“Jurisdiction once acquired is not exhausted by the rendition of judgment, but continues until such judgment is satisfied, and includes the power to issue all proper process and to take all proper proceedings for its enforcement.”

Wright v. Suydam, 79 Wash. 550; 140 Pac. 578.

Mutual Reserve Ass'n v. Phelps, 190 U. S. 147, 47 L. Ed. 987.

The Supreme Court of Washington has twice been squarely presented with the question of whether the superior courts sitting in probate have continuing jurisdiction to administer further upon an estate after the entry of a

decree of distribution, where it appears that the executor has not complied with the statutory requirement of filing receipts, and both times it has squarely held that they have. (See *State ex rel. Reser v. Superior Court* and *In re Dyer's Estate, supra.*)

The rule in Washington, then, is that the heirs may dispose of the property by agreement, but the property so disposed of, and the agreement, remain subject to the court's jurisdiction and approval until receipts are approved and the executor is finally discharged; and this is indisputably the rule as to uninventoried property never called to the attention of the court, where all the parties petition the court for relief, as in the present case.

(10) Under the above powers as to the supervision of partition, and in the exercise of its general jurisdictional powers, whatever view may be taken of the probate law of Washington, upon the filing of Katherine Mason's petition seeking relief in the estate of Amelia Pelkes, the court entertaining jurisdiction, inasmuch as it had full power, was further empowered to make a binding order determining the issues presented by the petition.

Kline v. Burke Const. Co., 260 U. S. 226; 67 L. Ed. 226.

B.

THE JURISDICTION OF THE SUPERIOR COURT OF WASHINGTON SITTING IN PROBATE TO DECIDE WHO WAS OWNER OF THE STOCK IN QUESTION WAS SUSTAINED BY THE SUPREME COURT OF WASHINGTON IN THIS SPECIFIC CASE.

Judge Hawkins says in his answer (R. 15, 22), referring to the two petitions for writs of prohibition presented to the Supreme Court of Washington respectively by Katherine Mason and her husband, that

"The basis of these applications was that the Superior Court of the State of Washington sitting in probate

lacked the inherent jurisdiction to do and to hear the things and matters that court was then proposing to do and hear * * *.”

“Under the laws of the State of Washington, the denial of these applications for writs of prohibition by the Supreme Court of this State was equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues raised by the petition of Katherine Mason and the return of John Pelkes above referred to” (R. 22).

Second Proposition.

THE UNITED STATES DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION TO ENTERTAIN THE INTERPLEADER ACTION WHICH IS THE SUBJECT OF THESE PROCEEDINGS.

A.

THE FEDERAL INTERPLEADER ACT DOES NOT AUTHORIZE A CITIZEN OF ONE STATE TO BRING AN ACTION IN A FEDERAL COURT AGAINST ANOTHER STATE.

An interpleader action under the Federal Interpleader Act cannot be brought “to compel or restrain state action”. (*Worcester County Trust Co. v. Riley*, 302 U. S. 292, 296; 82 L. Ed. 268, 273, 58 Sup. Ct. Rep. 185, 187.) This Court in the last cited case said “a suit nominally against individuals but restraining or otherwise affecting their action as State officers, may be in substance a suit against the State, which the Constitution forbids.” (Citing many cases.)

Section 24 (26) of the Judicial Code, 28 U. S. C. A. § 41 (26), known as the Federal Interpleader Act, is set out in the opinion of the Circuit Court of Appeals at p. 348 of the Transcript of Record herein as follows:

“Section 24 (26) of the Judicial Code, 28 U. S. C. A. § 41 (26), provides that the district courts of the United States shall have original jurisdiction:

“(a) Of suits in equity begun by bills of interpleader or bills in the nature of bills of interpleader duly verified, filed by any * * * corporation having in * * * its custody or possession money or property of the value of \$500 or more, or having issued a * * * certificate * * * or other instrument of the value or amount of \$500 or more * * * or being under any obligation written or unwritten to the amount of \$500 or more, if—

“(i) Two or more adverse claimants, citizens of different States, are claiming to be entitled to such moneys or property, or to any one or more of the benefits arising by virtue of any * * * certificate * * * or other instrument, or arising by virtue of any such obligation; and

“(ii) The complainant (a) has deposited such money or property or has paid the amount * * * due under such obligation into the registry of the court, there to abide the judgment of the court. * * *

“Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

“(b) Such a suit may be brought in the district court of the district in which one or more of such claimants resides or reside.

“(c) * * * (Said) court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any United States court on account of such money or property or on such instrument or obligation until the further order of the court * * *

“(d) Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be necessary or convenient to carry out and enforce the same.”

In the *Riley* case above cited this Court said:

“* * * that a suit nominally against individuals, but restraining or otherwise affecting their action as State officers, may be in substance a suit against the State, which the Constitution forbids * * *” (citing many cases).

In the case at bar Judge A. W. Hawkins, as a judge of the Superior Court of Washington, J. C. Cheney, as receiver appointed by that court, and the Seattle First National Bank, as Administrator of the Estate of John Pelkes, were included as defendants in the interpleader suit.

The purpose of the action as to those three defendants was that they

“and each of them, be immediately restrained without notice from attempting to take any further proceedings or action in regard to said stock * * *” (R. 13).

In other words the functioning of the Superior Court of the State of Washington with respect to the probating of the estate of John Pelkes and the enforcement, through the equity action then pending, of the decree in probate rendered in case No. 15946, was to be entirely stopped by the intervention of a Federal court in a matter that did not involve a Federal question. The *Riley* case (*supra*) restates the general law that such is specifically prohibited by the U. S. Constitution.

Since Judge Hawkins, his receiver Cheney, and the administrator Seattle First National Bank, were merely acting in the performance of their duties in probating an estate and giving effect to a decree of a Washington court sitting in probate—duties imposed upon them by law—any errors committed being curable by appeal to higher State courts, the language of this Court in the *Riley* case is peculiarly in point.

“* * * it cannot be said that the threatened action of respondents involves any breach of State law or the laws or Constitution of the United States. Since the proposed action is the performance of a duty imposed by the statute of the State upon State officials through whom alone the State can act, restraint of their action, which the bill of complaint prays, is restraint of State action, and the suit is in substance one against the State which the Eleventh Amendment forbids.”

(*Worcester County Tr. Co. v. Riley, supra.*)

Since the filing of the Petition for a Writ of Certiorari herein, the case of *Asher v. Bone*, 100 Fed. (2d) 315, reported in the advance sheets under date of January 30, 1939, and decided by the same Circuit Court of Appeals which made the decision in the present case, has been published.

We cite the decision now as being a correct view of pertinent law and as being in substantial conflict with the previous decisions in the case at bar. In *Asher v. Bone, supra*, the complainant, a resident of Illinois, sought in the Federal District Court in Idaho to recover her distributive share of an estate which had been probated in a State court of Idaho, her contention being that she had, through extrinsic fraud, committed in the probate proceedings, been deprived of such distributive share.

The Circuit Court of Appeals denied the jurisdiction of the Federal court to interfere with the Idaho probate proceedings and held that:

“The jurisdiction to determine the interest of respective claimants on an estate in Idaho is exclusively in the probate courts of that state having jurisdiction of the proceedings and the determination thereof by such probate court, whether right or wrong, is conclusive and subject only to be reversed, set aside or modified on appeal.” (Decision, p. 317.)

The record in the present case shows that the Idaho Group petitioned in the Washington probate proceedings

that the stock in question be decreed to be their property. Those probate proceedings had not then been closed. By their action the Idaho Group submitted themselves to the jurisdiction of the Washington Superior Court sitting in probate. Later, challenging that court's jurisdiction, the Idaho Group sought, by prohibition proceedings in the Supreme Court of Washington, to prohibit the Washington Superior Court from proceeding with the matter. Prohibition was denied by the Supreme Court of Washington and the jurisdiction of the Superior Court consequently upheld. It is clear that under the ruling in *Asher v. Bone*, the Federal court in Idaho could not interfere with the decision of the Washington Superior Court sitting in probate.

Furthermore, in *Asher v. Bone*, *supra*, one Osburn, having the requisite diversity of citizenship, had appeared in the U. S. District Court, and had objected to its jurisdiction. He, however, failed to join in the appeal to the Circuit Court of Appeals from the District Court's judgment asserting its jurisdiction. It was held by the Circuit Court of Appeals that, despite the fact that the U. S. District Court had no jurisdiction of the controversy, the decree of the U. S. District Court was binding on Osburn so far as it affected property distributed to him. (Decision, p. 319.)

The record in the present case shows that, while the probate proceedings were still open in the Washington Superior Court, the Idaho Group not only subjected themselves to the jurisdiction of that court, but were the very parties invoking such jurisdiction, and that they never appealed from the final adjudication of the Washington court's affirming such jurisdiction.

The U. S. District Court in this present action held that it had no jurisdiction to reverse the Idaho State courts. By the same token, and on the authority of *Asher v. Bone*, *supra*, and other cases here cited, it had no jurisdiction to reverse the Washington State courts. Nevertheless it has

proceeded to make the decision of the latter courts ineffective by restraining the Washington Group, who *have* properly objected to the U. S. District Court's jurisdiction and *have* appealed to the Circuit Court of Appeals, from proceeding to enforce the Washington probate decree in their favor.

B.

THE FEDERAL INTERPLEADER ACT CANNOT BE UTILIZED TO SECURE THE REVERSAL OF A JUDGMENT RENDERED BY A STATE COURT ACTING WITHIN ITS JURISDICTION NO FEDERAL QUESTION BEING INVOLVED.

The Federal Interpleader Act does not, because it constitutionally cannot, authorize a Federal court to review and affirm or reverse the judgment of a State court, there being no Federal question involved.

The U. S. District Court in its decision herein recognized the foregoing, saying:

"Its (*i. e.* the Idaho State Court's judgment) effect is a bar to the present proceeding in so far as it seeks to deprive Katherine Mason of the ownership of the 15299 shares;" (Opinion of Judge Cavanah, R. 336).

The U. S. District Court held as follows: (Syllabus 9—*Sunshine Mining Co. v. Treinies*, 19 F. Supp. 587):

"9. Where Washington Court rendered decree distributing decedent's personality and had no continuing jurisdiction, under statutes, and distributee instituted Idaho proceeding against holders of stock, who appeared, to enforce oral trust arising out of distribution of stock, and then instituted proceeding in Washington for partition of stock, resulting in decision for holders, and Idaho Supreme Court rendered decision for distributee, and United States Supreme Court denied petition for certiorari, Idaho Supreme Court decision

finally adjudicated title to stock and barred statutory interpleader action in so far as it sought to deprive distributee of title (Rem. Rev. Stat. Wash. §§ 466, 1371, 1533; 28 U. S. C. A. § 41 (26)).”

The foregoing finding is based on an erroneous interpretation of the Washington laws. It, in effect, holds that if a respondent in the interpleader action has a final judgment in his favor declaring him to be the owner of the res in question, the judgment is “barred” from attack “in so far as it sought to deprive distributee of title”, by “statutory interpleader action”.

In other words, the theory of the Court appears to be that if the effect of the interpleader action is to deprive respondent of title under an Idaho judgment the action is barred.

By the same reasoning, if the Washington judgment is equally correct and conclusive and prior, as to both jurisdiction and time of rendition, are not the respondents equally barred from attacking *that* judgment “in so far as they sought to deprive the Washington distributee of title”?

We agree with the apparent conclusion of the U. S. District Court that the “statutory interpleader action” is barred if its purpose be to reverse the judgment of a State court. THERE MUST, HOWEVER, BE NO DISCRIMINATION BY THE U. S. COURTS AS BETWEEN STATE COURTS.

Since the inevitable result in this action must be either the reversal of a Washington court which had adjudicated title to one group or the reversal of an Idaho court which had decreed title to another group, it would seem that, under the logic of the decision of the U. S. District Court itself, it DID NOT have jurisdiction of the interpleader action.

If, upon examination, it results that the decisions of the Washington and Idaho courts, although conflicting, were both correct, then we have a condition described by this

Supreme Court in the case of *Worcester County etc. v. Riley, supra*.

"But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decision of State Courts shall be free from error, Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755; or require that pronouncements shall be consistent." (Italics ours.)

If the controversy is *res adjudicata* in Washington and equally *res adjudicata* in Idaho and no denial of a Federal right is involved, the Federal Interpleader Act cannot be invoked to cause a choice between the conflicting decisions of the respective State courts. (*Worcester County Trust Co. v. Riley, supra*.)

In the decision in the *Riley* case, this Court, commenting on the argument of counsel, said that counsel were confused as to

"the possibility of conflict of decisions of the courts of the two States, which the Constitution does not forestall."

and in effect decided that a Federal court cannot interfere with or review either State court decision where the denial of a Federal right is not involved.

Third Proposition.

If a Federal Interpleader Action is a proper one here, nevertheless the United States District Court and the Circuit Court of Appeals erred by failing to give the decree of the Washington State Court the full faith and credit required by the United States Constitution.

A.

THE WASHINGTON COURT'S DECREE IS ENTITLED TO FULL FAITH AND CREDIT IN THE FEDERAL COURTS, ALSO IN THE IDAHO STATE COURTS.

The other horn of the dilemma, wherein we assume that the Federal courts below had jurisdiction to entertain the bill of interpleader, presents the following:

Article IV, Section 1 of the United States Constitution, provides that

“Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.”

The Fourteenth Amendment inferentially contains the same requirement.

The foregoing mandates of the Constitution are made a duty of the Federal Courts by the provisions of Section 34 of the Federal Judiciary Act of September 24, 1789, Chap. 20, 28 U. S. C. A. § 725, which provides:

“The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply.”

This Supreme Court in its recent decision in *Eric R. Co. v. Tompkins*, 304 U. S. 64, 78; 82 L. Ed. 1188, 1194, held:

“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in

any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

In the above case the contention between the parties was as to what was the State law of Pennsylvania relating to a certain kind of injury. The Circuit Court of Appeals held that the matter was one of general law and *declined* to decide the issue of State law (as the U. S. Circuit Courts of Appeals so declined in the present case). This was held to be error and the decision was reversed.

The interpleader action involves a collateral attack on a Washington judgment, contrary to local law, and contrary to the actual Washington decisions in the instant case, and in other cases, and, if sustained, would be a denial of the "full faith and credit" accorded by the Constitution of the United States to the acts and proceedings of the Washington courts.

At pages 19 to 25 herein we have shown that, under the Washington statutes and the decisions of its courts, the Superior Court of Washington in case No. 15496 was acting entirely within its jurisdiction when it made the decree of May 31, 1935 (R. 282).

The Idaho State courts, however, decided against the jurisdiction of the Washington court notwithstanding that the Idaho Group had entered the Washington courts and had specifically invoked their jurisdiction.

In sustaining the Idaho court's decisions in this respect the U. S. District Court was probably influenced in its decision by the mistaken notion that, because the Supreme Court of Idaho had decided that the Washington court had no jurisdiction and this Supreme Court had denied petitioner a writ of certiorari to review that decision, such denial constituted an affirmance of the Idaho judgment.

This is clearly error, as this Court plainly stated in *United States v. Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co. v. Woolf Bros. & Co.*, 240 U. S. 258; 60 L. Ed. 634.

The foregoing error was supplemented by the additional error of the Circuit Court of Appeals in refusing to "re-litigate the issues" as it said, which meant, in fact, a refusal to consider the jurisdictional facts of record and the pertinent laws, of both Washington and Idaho, in order to determine whether the courts of those states were acting within their respective jurisdictions in deciding as they had.

B.

WHEN THE RECORD, AS IT DOES IN THE PRESENT CASE, CONTAINS THE EVIDENCE OF THE JURISDICTIONAL FACTS AND THE LAWS OF THE TWO STATES WHOSE COURTS HAVE RENDERED OPPOSING JUDGMENTS CONCERNING THE TITLE TO THE SAME PROPERTY, IT IS THE DUTY OF THE CIRCUIT COURT OF APPEALS, ASSUMING THAT IT HAS JURISDICTION OF THE ACTION, TO CONSIDER AND PASS UPON THE SAID FACTS AND APPLICABLE STATE LAWS IN ORDER TO DETERMINE WHETHER OR NOT EITHER STATE HAD JURISDICTION TO RENDER ITS JUDGMENT.

Upon appeal, the Circuit Court of Appeals held that the District Court had jurisdiction because respondents were citizens of different States and because more than \$500.00 was in controversy and deposited with the Registry of the Court. It did not discuss the question of the indirect involvement of a state as a party respondent nor would it consider either the facts or the laws of the two states involved, by virtue of which each claimed the prior and exclusive jurisdiction to be in its own courts and denied categorically the jurisdiction of the other's courts.

If jurisdiction lay in the U. S. District Court then the duty of the Circuit Court of Appeals was clear:

"The Court is to weigh the right or title of each claimant under the law of the State in which it arose and de-

termine which according to equity is better.” (*Sanders v. Armour Fertilizer Works*, 292 U. S. 190 at 200.)”

This the Circuit Court of Appeals refused to do. It thereupon held that the Idaho courts, having a right to examine into the jurisdiction of the Washington courts and having decided against their jurisdiction, must be sustained, without consideration of the fact that the Washington courts first obtained jurisdiction, first adjudicated the title involved, and expressly declared that the Idaho courts had no jurisdiction. This refusal to consider the facts adduced in Washington and the laws of that state is a grievous error and a violation of the full faith and credit to which Washington judicial proceedings are entitled under Art. IV Sec. 1 of the U. S. Constitution.

We further assert that, assuming jurisdiction to have been in the U. S. District Court, its refusal to perform its duty as outlined by Justice McReynolds in the *Sanders* case, *supra*, was a violation of petitioner's constitutional right to due process of law.

The Circuit Court of Appeals cited *Pendelton v. Russell*, 144 U. S. 640, 644 as authority for its refusal to consider whether or not the Washington courts had acted within their jurisdiction because the Idaho court had decided to the contrary.

We submit that the said case merely, and correctly, decides that

“as a matter of course, the jurisdiction of every court is open to inquiry when its judgments and decrees are produced in the court of a State, and it is there sought to give them effect.”

Obviously a decision of a State Court in an Admiralty matter where the United States had exclusive jurisdiction could be considered by another court to be as a nullity. However, as has been noted herein (*Asher v. Bone, supra*),

the decision of a state court of general jurisdiction, sitting in probate proceedings involving property within the state, and having jurisdiction of persons who have appeared before it, cannot be questioned by the Federal courts or by courts of other states, no matter how erroneous its decisions may be. Furthermore, no valid reason exists or has been shown, why decisions of Washington courts are more open to question than decisions of Idaho courts.

WHEREFORE, it is respectfully prayed that the decision of the Circuit Court of Appeals and the U. S. District Court be reversed and

(a) that they be adjudged to have no jurisdiction of the interpleader action herein; or

(b) if their jurisdiction be sustained, that judgment in favor of Evelyn H. Treinies be directed and the decision of the Idaho State Courts be decreed void for lack of jurisdiction.

San Francisco, June 1, 1939.

Respectfully submitted,

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.

SUPREME COURT OF THE UNITED

STATES

SEP 30 1930

OCTOBER TERM, 1930

No. 4

EVELYN TREINIES,

Petitioner,

vs.

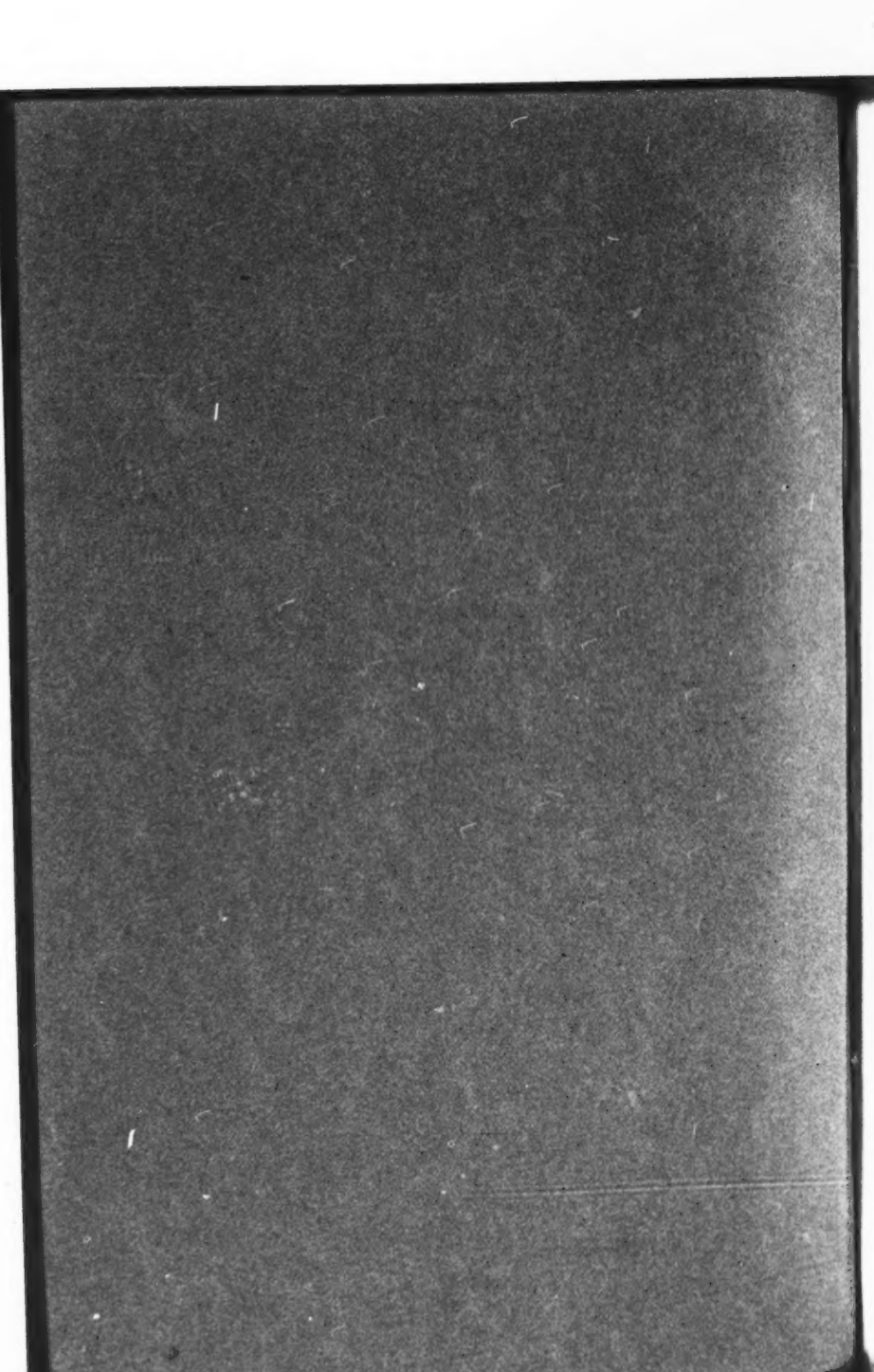
SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY TO THE BRIEF OF
RESPONDENT, THE SUNSHINE MINING
COMPANY.

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFER,
Of Counsel.



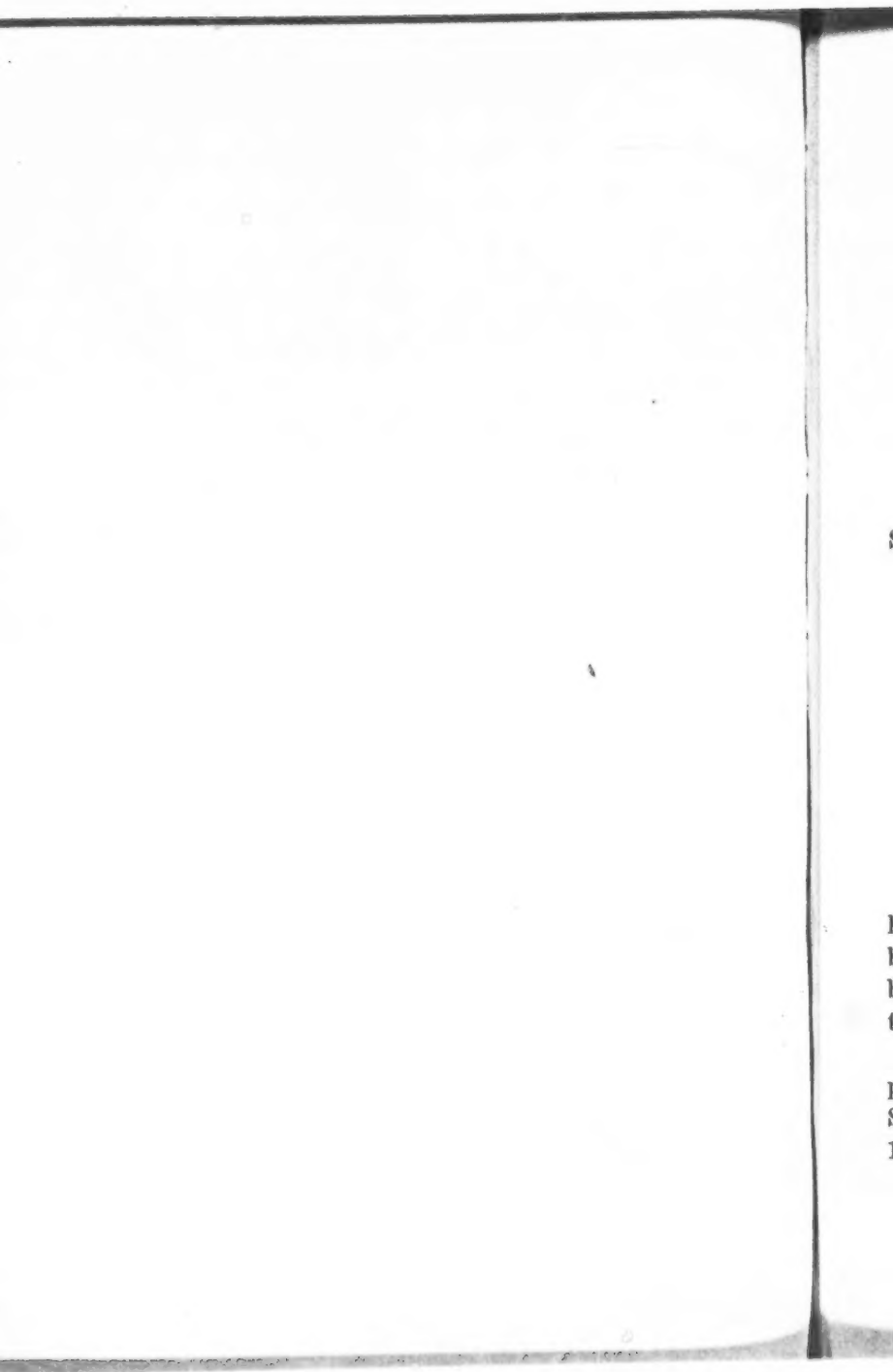
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 4

EVELYN TREINIES,

Petitioner,

vs.

SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON, AND F. C. KEANE.

**PETITIONER'S REPLY TO THE BRIEF OF
RESPONDENT, THE SUNSHINE MINING
COMPANY.**

Respondent, the Sunshine Mining Company, in its brief
s filed a statement of the case which naturally forms the
sis of its argument. Petitioner's counsel in their opening
ief have attempted to be meticulous in their statements of
e facts and the law of the case.

We find on page 12 of respondent (Sunshine Mining Com-
ny's) brief a discussion of the order of the Washington
superior Court in the probate proceedings made May 31,
35. Respondent says:

“This order purported to adjudicate John Pelkes to
be the owner of said 30,598 shares of stock (R. 282).”

In other words, the order declared Pelkes to be the owner of the stock and established his title thereto as against the Masons. It cleared title thereto for any assignees of the same who might have acquired it from Pelkes prior to the date of the order. In that sense it established Miss Treinies' ownership in the stock.

Counsel proceeds:

"This order did not however, as stated on page 6 of petitioner's brief award the Sunshine stock to Pelkes' transferee, Evelyn Treinies."

Technically, we stand corrected. However, the inaccuracy is immaterial because, IN EFFECT, the order did just that thing. Since there never has been any question in any of these proceedings concerning the validity of Pelkes' assignment to Treinies; since respondent "admitting the validity of said order as a judgment" (page 29, Brief of respondent, Sunshine Mining Company), also admits that the order established Pelkes' title to the stock while he had it and also admits the validity of the assignment of Pelkes to Treinies of 16,000 shares of the stock. (See page 30, Brief of respondent, Sunshine Mining Company), and the fact that it transferred on its books the said stock to Treinies, the order of May 31, 1935, IN EFFECT, did clear the title of petitioner Treinies to that stock by awarding it to her assignor, Pelkes, as against the Masons. Respondent further says:

"nor did it restrain the Idaho group from further litigating the matter in any court".

If the use of the expression "any court" be open to criticism we will answer the same by quoting from the order of May 31, 1935, itself (R. 291 (11)):

"On this petition Pelkes obtained a temporary restraining order, restraining Mrs. Mason from prosecuting the action in *Idaho* until the administration of the Amelie Pelkes estate was completed, * * *"

We merely mention that hairsplitting, in passing. The injunction was from proceeding "in Idaho" and not from proceeding in "any court". Further comment is unnecessary.

On page 14 of respondent's brief we come to a really serious matter. Respondent up to this point had been setting out his statement of the case chronologically and without evidencing any particular bias. He now says:

"At this time, March 17, 1937, the records in the Idaho and Washington state courts were in this status"

and then proceeds to tell this Court what the status was. However, the most important fact which forms the crux of the entire controversy was omitted (inadvertently, of course). We will, therefore, restate the first ten lines following the word "status" of respondent's paragraph, inserting therein, in italics, what it omitted.

"There was a judgment and decree of the State District Court of Idaho which had been modified and affirmed by the Supreme Court of the State of Idaho which adjudged Katherine Mason to be the owner of said 15,299 shares of stock in the Sunshine Mining Company; on this judgment and decree of the Idaho Supreme Court, the Supreme Court of the United States had denied a petition for writ of certiorari." *There existed also a final decree of the Washington Superior Court, sitting in probate, finally distributing the estate of Amelia Pelkes by virtue of which final decree, the stock in question was declared to belong to John Pelkes and which decreed that Katherine Mason had no interest therein; this decree had never been appealed from.* In the Washington State Court suit was pending against the Masons and the Sunshine Mining Company involving the same stock".

This action was brought by the Seattle First National Bank as administrator of the estate of John Pelkes, and Evelyn

Treinies, as a suit in equity, "as an original bill in the nature of a supplemental bill", to enforce the decree of the Superior Court of the State of Washington in the probate proceedings (R. 243) and to clear clouds from the title to the stock in question caused by the issuance of new certificates issued in accordance with the judgment of the Idaho District Court, and to enjoin certain named defendants from claiming rights to the stock in question by virtue of the decrees of the Idaho courts (R. 243). It was not an action brought to determine who was the owner of the stock.

The balance of the paragraph beginning on the last line of page 14 and completing page 15 need not be restated. While it shows some bias and prejudice against petitioner herein, we deem that of no particular importance.

Respondent begins its argument on page 16 by reiterating the argument of the decision of the Circuit Court of Appeals, wherein that court attempted to show why it believed that the United States District Court had jurisdiction of the action. The court recites the jurisdictional requisites for an interpleader action provided for by Interpleader Act enacted January 20, 1936. It then asserts that all the mentioned requisites existed in this action and that therefore the United States District Court had jurisdiction.

Whether or not a controversy existed is open to discussion. The original controversy concerning the title to the stock had long ago been settled by the decision of the Superior Court of Washington made May 31, 1935, from which no appeal had ever been taken.

Whether or not a decision of another State court, which for lack of jurisdiction over the *subject matter*, is null and void, could possibly revivify the controversy is a matter of very serious conjecture. Fortunately a solution of that question is unnecessary here.

The Interpleader Act is not available here, notwithstanding that the requisite jurisdictional requirements apparently exist, because to apply the act would involve

- (a) a failure to give full faith and credit to a valid State judgment, and
- (b) interference with a State court, and consequently with a State.

By enjoining petitioner from proceeding with the action pending in Spokane County (R. 244), the United States District Court committed error. Section 265 of the Judicial Code, Act of March 3, 1911, R. S. Section 720, 28 U. S. C. A. 379, prohibits a United States court from staying proceedings in a State court except in cases where an injunction may be authorized by any laws related to proceedings in bankruptcy.

The provisions of the Interpleader Act do not repeal this Section. (*Lowther v. New York Life Ins. Co.*, 278 Fed. 405, C. C. A. 3, 1922). *Hill v. Martin*, 296 U. S. 393, 56 Sup. Ct. 278, 80 L. Ed. 293.

At page 28, respondent captions its argument "Idaho State Court judgment must be given full faith and credit". It advances the conclusion that the Idaho State court had jurisdiction of the parties (Treinies, Pelkes and Sunshine Mining Company), and of the subject matter. It asserts that jurisdiction of the parties named existed because they submitted to the jurisdiction of the court by appearing therein.

We deny its jurisdiction of the subject matter (the title to the mining stock involved) because that title had already been adjudicated by a final judgment or decree of a Washington State court having a prior and exclusive jurisdiction of both parties and the subject matter.

Respondent continues, saying that before the Idaho case was tried certain proceedings in the matter of the estate of

Amelia Pelkes were had in the Superior Court of the State of Washington, but it *omitted* to state that these proceedings were in estate proceedings that had commenced in 1922 and had never been closed, and that the proceedings respondent was referring to as brought on December 19, 1934, were *initiated* by the petition of Katherine Mason (R. 214).

Respondent's statement (page 29, line 2) that Evelyn H. Treinies was not a party to any of these proceedings is not accurate. Since Pelkes was her assignor, she stood in his shoes as far as the proceedings involved a question of title as between Pelkes and Mason. Therefore, in the sense that she was bound by the result of that controversy she was really a party to it, although not ostensibly so.

As respondent says (page 29, lines 9-10), this judgment or decree entered in the estate proceedings in the Washington court is relied on by petitioner as establishing her title to the stock in question. Its validity and legality were admitted (for argument's sake only), but since respondent, Sunshine Mining Company, "recognized" this judgment and acted accordingly (page 30) by transferring the stock on its books, as directed by John Pelkes, it seems futile for it to complain because it was not a party to the probate proceedings and to claim that the order or judgment of May 31, 1935 "could do nothing more than establish that John Pelkes at a previous time was the owner of 30,598 shares of the stock in the Sunshine Mining Company."

As a matter of fact, the Washington Superior Court, in Probate, had before it the Pelkes-Mason rival claims and passed upon that dispute and decided in whom the title lay.

After this admittedly "valid" and "legal" and final judgment, which respondent, the Sunshine Mining Company, had "recognized" and acted upon had been rejected as a defense to the action in the Idaho courts, said respond-

ent, possibly misled by the refusal of the United States Supreme Court to review the action of the Idaho courts on certiorari, became imbued with the idea that only the Idaho court's judgment was valid and that the Washington court's judgment was not. That is the purport of its argument here. It says, that, as far as the rival claims of Treinies and Mason are concerned and respecting the Sunshine Mining Company is

“bound to recognize the decree of the Idaho court and that that judgment must be accorded full faith and credit in the State of Washington”.

However, it utterly fails to tell why the “valid, legal” and recognized judgment of the Washington court does not merit the same full faith and credit in Idaho, notwithstanding that the constitution of the United States provides that it should. Just why the Sunshine Mining Company should select the Idaho State court's decision over the “legal” and “valid” and final decision of the Washington State court, which decision it had “recognized” and acted upon, is idle speculation.

Suffice it to say it made a free selection and guessed wrong because it ignored the law of the case.

At page 32 counsel cite and comment on the case of *Roche vs. McDonald*, 275 U. S. 449, 72 L. Ed. 365, and cite it as decisive of their contention.

The case is excellent authority in support of the contention that a judgment of a state court which had jurisdiction of the persons and the subject matter must be given full faith and credit in the courts of all other states, notwithstanding that the said judgment may have been founded on laws repugnant to those of those other states and founded upon error in the interpretation of their laws, and has been actually in contravention of the laws of those other states.

The case is excellent authority for the petitioner here. Counsel has overlooked several important details, however.

First: We are dealing, not with *statutes*, but with adverse *judgments*, of two different states.

Second: The "recognized," "legal" and "valid" judgment of the Washington court (referring to the decree of May 31, 1935) was made by a court that had jurisdiction of the persons (Masons actually invoked it in their own behalf) and of the subject matter. It was final. It was also prior and therefore exclusive as to jurisdiction.

Third: Because of this final judgment and the court's prior and exclusive jurisdiction which was pleaded in the Idaho State court, that court could not acquire jurisdiction of the subject matter. "Of course, a want of jurisdiction over either the person or the subject matter might be shown". (*Roche vs. McDonald, supra*, at Page 369 Law. Ed.)

The foregoing defines the limits of the jurisdiction of the courts of the state in which full faith and credit for the judgment are claimed. That is as far as the Idaho State court could have proceeded in the case at bar. By denying the prior and exclusive jurisdiction of the Washington State court it refused to give full faith and credit to the perfectly "legal" and "valid" judgment of that court which respondent had fully recognized.

It may be, in view of the denial by this Court to grant certiorari in the case of *Pelkes, et al. vs. Katherine Mason, et al.*, No. 379, October Term, 1936, that this court felt that such full faith and credit had not been denied by the Idaho Courts because of a failure to prove, in those courts, the relevant Washington laws and decisions.

That matter is of no great importance here as we are not attacking the validity of the Idaho State Court's judgment in these proceedings.

Since both of the state court's judgments involved herein are final and not subject to review it may be that we are confronted with the anomaly mentioned in the case of *Worcester County Trust Company vs. Riley* (58 S. Ct. 185, 302 U. S. 292), to-wit:

“* * * conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action” (at page 299).

It is a condition “which the constitution does not forestall”, (page 298).

Frankly, petitioner herein would much prefer that this court sustain the jurisdiction of the United States District Court to entertain the interpleader action, for the reason that the court would be compelled to review and weigh the decisions of the two state courts and pass upon their relative merits. Since such a decision must perforce be in favor of the Washington judgment it would settle and simplify all proceedings that may be had in the future to make it effective. However, our interests must give way when the honest and correct solution of the legal problem involved demands it.

Nothing has been said in respondent's brief that creates the slightest impression that a statute of the United States can, in accordance with our constitution, impose the power on a United States court to review collaterally the judgment of a state court where no federal question is involved or to weigh the relative merits of the conflicting decisions of two state courts and determine which should be enforced, or otherwise interfere with the proceedings of either.

From page 39 to the end of its brief respondent advances and discusses the proposition

“Idaho State Court Judgment and Decree is Res Judicata and Parties are Estopped from Questioning Validity”.

With that general proposition petitioner has no quarrel *except* that there being no jurisdiction in that court over the subject matter it would appear that any aggrieved litigant always had the legal right to attack the judgment in any appropriate collateral action. But petitioner is not interested in that particular question at this time. Our position is that inasmuch as a competent Washington State Court, sitting in probate, had jurisdiction of the proceedings entitled “Estate of Amelia Pelkes,” which proceedings were not closed until the final decree of May 31, 1935, and in which proceedings the title to the stock in the Sunshine Mining Company was adjudicated as between Pelkes and the Masons, that final decision was just as conclusive as the Idaho State Court’s decision and therefore equally *res judicata*. It had the merit of having first acquired jurisdiction of the subject matter; of having first rendered a final decree wherein and whereby the rival claims of the interested parties were adjudicated; of having its final judgment pleaded as a defense in the action in the Idaho State courts. The decree although made by a probate court was as conclusive as the judgment of any court could be.

“The decisions unquestionably hold that the probate court of Cook County is a court within the meaning universally accorded that term. In determining the rights of creditors the function of the probate judge is judicial. He hears and determines the matters submitted and enters orders therein. His adjudication is final and conclusive unless, in the manner provided by law, his judgment is reversed or set aside on appeal or

review. Herman on Estoppel and Res Judicata, Vol. 1, page 9-392; U. S. v. Paisley, 26 Fed. Supl. 237 (Dist. Ct. Ill. 1938)."

Respondent Sunshine Mining Company has made no effort to show that the judgment rendered May 31, 1935, by the Washington court, sitting in probate, did not finally and conclusively, as between Pelkes and Masons, establish the title to the Sunshine stock to be in Pelkes. Said respondent actually admitted its recognition of that final judgment and explained how it had governed itself accordingly by reissuing certificates in accordance therewith.

It appears to argue that "since" it was made a party defendant in the Idaho State Court case and "since" the Oregon group presented its defense of estoppel by judgment of the Washington court in that case the decision of that court is *res judicata*. The citations quoted on pages 42 and 43 of said respondent's brief are accurate, but not applicable. Omitting the effect of lack of jurisdiction of the subject matter in the Idaho court (due to the prior judgment in Washington), the effect of the Idaho State court's judgment is to make it *res judicata in that State*, but not in Washington, since an Idaho court has no power to nullify the proper judgment of the court of another State. In this connection the following excerpt from the decision of *Sanders v. Armour Fertilizer Works*, 292 U. S. 190; 78 L. Ed. 1206 (cited by both sides) is peculiarly in point:

"The Armour Fertilizer Works asks nothing under any Texas law. Brought into the District Court against its will, it was held there against its protest and enjoined from proceeding further in Illinois. It now claims priority of right and only asks what it would have secured but for the injunction. Under such circumstances, to hold that the statutes of Texas control would destroy rights duly obtained in Illinois; would permit insurance companies, by interpleader proceed-

ings, to change the position of defendants; and in effect, seriously interfere with the impartial adjustment of existing equities. We think Congress had no intention to permit such destruction of acquired rights if, indeed, it had power to do so." *Sanders v. Armour Fertilizer Works, supra* (p. 201; p. 1211).

We have heard of cases where counsel have talked themselves out of court. It would seem that that very thing has happened to respondent here.

It urges the point that "Since the Sunshine Mining Company was made a party to the case in the Idaho State court", it is concluded thereby. (Page 41, Brief of Respondent Sunshine Mining Company.) And as it appears that it is bound by that decision and *subject to liability* if it fails to comply with that judgment and is possibly subject to a double liability (possibly, largely due to the fact that it patently espoused the cause of the Masons in the Idaho State courts) it would appear to petitioner that the respondent negatives by its argument what it alleged in its bill of interpleader, i. e., that it is a mere stakeholder and disinterested in the proceedings, except insofar as they would establish which of the parties, Treinies or Masons, had the better right.

"Assertion by the complaint of entire disinterestedness is essential to a bill of interpleader."

Sanders v. Armour Fertilizer Works, supra.

"Interpleader must be denied if stakeholder has any interest."

Stusser v. Mutual Union Insurance Co., 127 Wash. 449; 221 Pac. 331; 15 R. C. L. 226.

In order to give effect to the judgment of the Superior Court of Washington, sitting in Probate (decree of May 31, 1935), the Washington group filed an action (R. 244) after first obtaining permission to do so (R. 243) entitled "John

Pelkes and Evelyn H. Treinies, Plaintiffs, *vs.* Katherine Mason, T. R. Mason, Lester H. Harrison, Walter H. Hanson, F. C. Keane, Richard S. Munter, and Sunshine Mining Company, Defendants." This action was filed August 12, 1936. Due to the death of John Pelkes on January 19, 1937, the Seattle National Bank, as administrator, together with the petitioner, filed their amended complaint (R. 256). The order granting permission to file the foregoing action is set out at length at page 243 of the Transcript of Record herein. It shows:

"* * * that plaintiffs be and they hereby are granted permission to file the complaint herewith entitled as above as *an original bill in the nature of a supplemental bill for the purpose of giving effect to a judgment of this court rendered in case No. 15496 entitled "In the matter of the estate of Amelia Pelkes, deceased" on May 31, 1935.*"

In said action, to quote from respondent's Sunshine Mining Company, brief, page 15:

"Pelkes and Treinies were seeking a money judgment for damages which they alleged they were entitled to by reason of the Sunshine Mining Company refusing to recognize Evelyn H. Treinies as the owner of said identical stock (R. 256, Ex. 7)".

Further prosecution of the action referred to was halted by order of the United States District Court in these proceedings. Clearly, the interest of respondent, Sunshine Mining Company, in this litigation appears from the foregoing. Naturally, a judgment in favor of the Idaho group in the present proceedings would free respondent Sunshine Mining Company from the necessity of recognizing petitioner as owner of the stock in question but, also from *per-*

sonal liability for having refused to so recognize her as alleged in the complaint and amended complaint in the Washington proceedings just above mentioned.

San Francisco, California, September 20, 1939.

THOS. D. AITKEN,
Counsel for Petitioner.

ALFRED C. SKAIFE,
Of Counsel.

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OCT 6 1939

SUPREME COURT OF THE UNITED STATES

CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1939

No. 4

EVELYN TREINIES,

Petitioner,

vs.

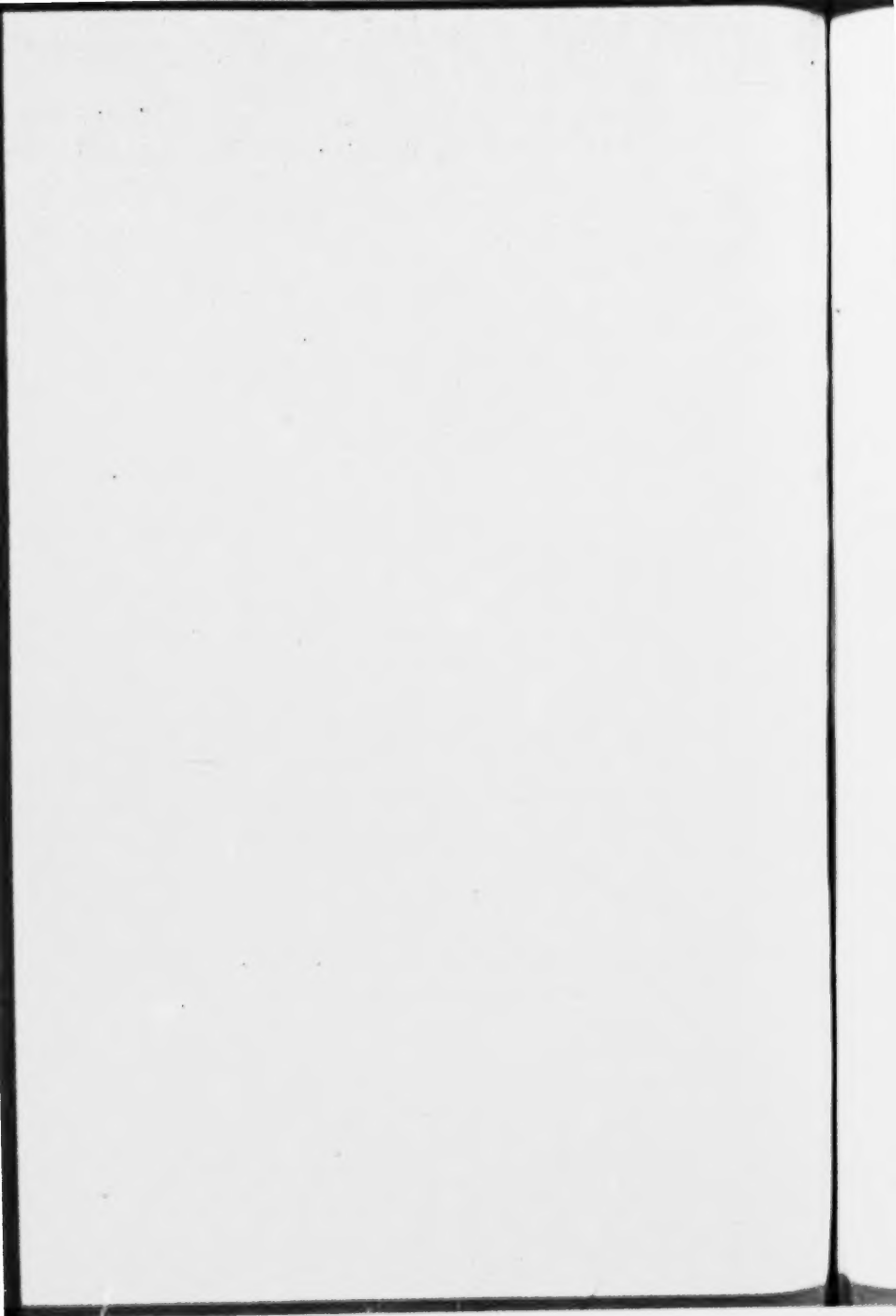
SUNSHINE MINING COMPANY, KATHERINE MASON, T. R. MASON, LESTER S. HARRISON, GRACE G. HARRISON, WALTER H. HANSON, EDNA B. HANSON AND F. C. KEANE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

**PETITIONER'S REPLY TO BRIEF OF RESPONDENTS
KATHERINE MASON ET AL.**

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ALFRED C. SKAIFE,
Of Counsel.



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SUNSHINE MINING COMPANY, KATHERINE MASON, T. R. MASON, LESTER S. HARRISON, GRACE G. HARRISON, WALTER H. HANSON, EDNA B. HANSON AND F. C. KEANE.

**PETITIONER'S BRIEF IN REPLY TO THAT OF THE
RESPONDENTS OTHER THAN THE SUNSHINE
MINING COMPANY.**

These proceedings are before this Court for the purpose of solving two problems:

- a) Is the action brought by respondent, the Sunshine Mining Company, by virtue of the United States Interpleader Act, a proper one under the circumstances?
- b) If the United States Courts had the necessary jurisdiction of the case, did the full faith and credit clause of the Constitution not demand that the judgment of the Washington State Court, sitting in

probate, be entitled to full faith and credit, as the judgment of the Court having prior, continuous and exclusive jurisdiction of the subject matter and persons in this litigation?

It would seem that the respondents, other than the Sunshine Mining Company, have utterly failed to appreciate the above problems. This is shown conclusively by their "Statement of the Case" included in pages 2 to 8 of their brief. If the said "Statement of the Case" is intended as a "statement of facts", it can only be characterized as a tissue of misstatements intended to portray the respondents conception of the facts at issue between the principal parties in interest as tried in the State court of Washington and Idaho. We take it that this Court has little interest in such facts. Since these misstatements made by respondents permeate the entire brief, we shall here enumerate a few of them and state in a parallel column the contrary facts as found by the Washington Court:

As stated in respondent's Brief, page 3.

"After the entry of said decree of distribution Mr. Pelkes and Mrs. Mason at Kellogg, Idaho, divided equally between them in accordance with Mrs. Pelkes' intention and their agreement the property they then owned in common received from said estate, Mr. Pelkes holding the one-half interest in the certificate for 30,598 shares of Sunshine Mining Company stock and in the other stock certificates in trust for Mrs. Mason."

As found by Washington Court (R. 286).

"Upon the rendition of the decree of distribution aforesaid, and before any further steps had been taken in the cause, Katherine Mason discussed with John Pelkes a partition of the estate to which they were jointly entitled under the will of Amelia Pelkes. He was then 70 years of age she was 44. She had long been married, and resided with her husband, a physician, at Kellogg, Idaho, within a few miles of the prop-

As stated in respondent's
Brief, page 3—Continued.

As found by Washington
Court (R. 286)—Continued.

erty of the Sunshine Mining Company. She desired such a partition of the property of the estate as would give her, in her sole and undivided right, liquid assets which she could realize upon as she desired during the next few years. John Pelkes was willing that she should receive her share in such form as she desired (fol. 635), and it was agreed between them that he would deliver to her a mortgage for \$10,000 on property in Spokane, which had an appraised value of \$10,000, 6,000 bonds of the Interstate Utilities Company of the appraised value of \$5,100, and a promissory note of her husband, T. R. Mason, for \$1,000 and that those items should be received by her in full settlement and discharge of her distributive share of the estate of Amelia Pelkes; that, in consideration of her receiving that property, all the remainder of the property of the estate should go to and be received by John Pelkes in his sole and undivided right, in full settlement and discharge of his distributive share of the estate of Amelia Pelkes. In making this agreement, both parties had

As stated in respondent's
Brief, page 3—Continued.

As found by Washington
Court (R. 286)—Continued.

in mind the shares of mining stock belonging to the estate, including the shares in litigation, which had not been inventoried or administered on, and both intended and agreed that all those shares should go to and be received by John Pelkes in his sole right as a part of the distributive share of the estate to which he was entitled."

Respondents' Brief Pages
3-4.

As Found by the Washing-
ton Court (R. 286-7).

"In accordance with such agreement Mr. Pelkes and Mrs. Mason each became the owner of 15,299 shares of said Sunshine stock. Between the time of the entry of said final decree of distribution on August 9, 1923 and November 8, 1933, Mr. Pelkes sold disposed of and transferred 14,598 shares of the 15,299 shares of said stock owned by him. There thus remained but 16,000 shares of said stock, 15,299 shares of which Mr. Pelkes held in trust for Mrs. Mason. The wrongful disposition then attempted by Mr. Pelkes of said 16,000 shares of said stock to the petitioner herein, Mrs. Evelyn Treinies, is thus described by the Su-

"The partition agreement was fully performed so far as partition of the property was concerned. Katherine Mason received from John Pelkes, the property to which she was entitled thereunder and thereafter and enjoyed it in her sole right. John Pelkes took the remainder of the property of the estate and held and disposed of it as his own. No receipts were given for the received, no paper was executed or filed in court, and no steps were taken to close the estate, and the cause continued on the records of this court unclosed and without distribution of the property of the estate. Affairs so continued until 1934. About

Respondents' Brief Pages
3-4—Continued.

As Found by the Washing-
ton Court (R. 286-7)—
Continued.

preme Court of Idaho :
'Early in 1931, Pelkes and
Mrs. Mason met, in Cali-
fornia, appellant Evelyn
H. Treinies, a niece of his
deceased wife and a cou-
sin of Mrs. Mason. She
was at that time about 40
years of age, and he had not
seen her since she was a
child. During the time the
three were together appel-
lant, Treinies, showed great
affection for Pelkes, kissed
him frequently and made
proposal of marriage to him.
She continued her attentions
to him until the trial, and
took care of him during some
of his attacks of illness. No-
vember 8, 1933, appellants
Pelkes and Treinies, entered
into a contract wherein it
was agreed he should assign
to her 16,000 shares (then
market value \$3.00 per
share) of the capital stock
of the Sunshine Mining Com-
pany (and other income pro-
ducing property) and, in con-
sideration thereof, she should
support, maintain and care
for him to the best of her
ability during the remainder
of his life'. (Mr. Pelkes was
then 81 years of age.)

(Words in parentheses
ours.) Following receipt of

1928 work done on the prop-
erties of the Sunshine Min-
ing Company showed value
therein, and the stock in liti-
gation began to have appar-
ent value. As work pro-
gressed the mines began to
pay returns and dividends
were declared on the Com-
pany's shares, and by 1934
the shares in litigation had
a substantial market value.
During that year, Katherine
Mason and her husband,
T. R. Mason, began an action
in the District Court of the
First Judicial District of the
State of Idaho, in and for
the County of Shoshone,
against John Pelkes and
others claiming to have an
interest in the shares in liti-
gation."

Respondents' Brief Pages
3-4—Continued.

information in August, 1934, of such transfer of said stock to Mrs. Treinies suit in the State District Court of Idaho was instituted by Mr. and Mrs. Mason to enforce said trust as against said 16,000 shares as to the 15,299 shares thereof belonging to Mrs. Mason."

Respondents' Brief Page 5.

"Thereafter on May 31, 1935 the Superior Court of Spokane County, State of Washington, upon petition of Mr. Pelkes, entered in said probate proceedings of Amelia Pelkes, deceased, its "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor," referred to herein by petitioner as the Washington judgment. Such "Findings and Order" were procured by Mr. Pelkes in violation of a restraining order directed to Mr. Pelkes and Mrs. Mason issued by the State District Court of Idaho in the said trust suit pending therein."

As Found by the Washington
Court (R. 286-7)—
Continued.

As Found by the Washington
Court (R. 288).

"While the aforesaid action was pending, Katherine Mason filed in this court and cause a petition praying the removal of John Pelkes as executor of the will and estate of Amelia Pelkes and the appointment of an administrator with the will annexed to complete the administration of the estate. In that petition, which was verified by her, she alleged the probate of the will of Amelia Pelkes in this court, the appointment of John Pelkes as executor, the making of the decree of distribution, and the distribution of certain property of the estate to her and to John Pelkes, and that "• • • no proceedings were ever had or have been had to finally close said estate and that

Respondents' Brief Page 5—
Continued.

As Found by the Washington
Court (R. 288)—Continued.

said executor has never received a discharge nor filed any receipts from your petitioner for her distributive share of said estate."

(R. 292-3)

"While the aforesaid proceedings were in progress in this court, T. R. Mason affected to employ counsel in Idaho other than those who represented him and his wife in the Idaho action and in proceedings taken by him and by her in this court, *and upon this court issued an injunction pendente lite on the Pelkes petition, he procured from the Idaho court in which was pending the Idaho action aforesaid a temporary restraining order restraining John Pelkes, his attorneys, and all persons claiming by or through him, and Katherine Mason, her attorneys, and all persons claiming through her, from taking any steps or doing anything in this court and cause.*

I find that proceeding to be factitious, not prosecuted in good faith, and that the Idaho court was without jurisdiction to enjoin John Pelkes, an officer of this court, from taking such steps

Respondents' Brief Page 5—
Continued.

As Found by the Washington
Court (R. 288)—Continued.

as may be necessary or proper in the discharge of his functions as such officer. Neither was there jurisdiction, in view of the scope of the Idaho action, to enjoin Katherine Mason, a claimant to property of an estate in process of administration by this court from participating in the disposition and closing of the estate."

It will be observed from the above that Katherine Mason actually initiated the proceedings that resulted finally in the decree of May 31, 1935 upon Pelkes' cross-petition to Katherine Mason's original petition. It will be also observed that the Washington Court first issued an injunction pendente lite against Mrs. Mason and that, *after* that, the Masons secured their injunction in the Idaho Court, which proceedings Judge Lindsley of the Washington Court held to be "*factitious*", not prosecuted in good faith and that the Idaho Court was "without jurisdiction to enjoin John Pelkes, an officer of this court, etc."

Respondents lay considerable emphasis (page 6, Respondents' Brief) on the failure of this Supreme Court to grant a writ of certiorari to review the decision of the Supreme Court of Idaho in the case of Pelkes et al. vs. Mason et al., 299 U. S. 615.

Reference is made constantly throughout Respondent's Brief. If any reliance is placed upon the action of this Court in denying the said petition for certiorari it is clearly based upon a misconception of what the Idaho Supreme Court actually decided and of what a federal question really is.

That the Washington decree of May 31, 1935, was a final judgment by a court having prior, continuous and exclusive jurisdiction of the subject matter and was *res judicata* as to the issues of ownership involved therein, was duly pleaded by the Washington Group in the case instituted by the Masons in the Idaho State Court. During the trial of that case in the District Court of the State of Idaho the litigants stipulated as follows:

Mr. Cox: The parties stipulate that the District Court of the First Judicial District of the State of Idaho, upon appeal, may take judicial notice of the Statutes of the State of Washington and of the decisions of the Supreme Court of the State of Washington, with the same effect as is done by the Federal Court in the cases of its original jurisdiction; and that it shall be unnecessary to offer or to prove all the statutes of Washington or all the decisions of the Supreme Court of Washington—

The Court: As published either in the official reports of the Court or of the West Publishing Company—I mean the Pacific Reporter.

Mr. Cox: Yes.

Mr. W. G. Graves: Yes.

The said court, having these laws and decisions in mind rendered its decision in due time. Both parties appealed.

“Judicial notice may not ordinarily be taken of such foreign law; but the trial court may take such notice upon stipulation by the parties to that effect, in which event it will be presumed on appeal, in the absence of any proof on the matter, that the Court’s conclusions as to the validity and effect of the judgment were based upon and supported by some provision of these laws judicially noticed.”

15 Cal. Juris. 243-4; section 247.

Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972.

Notwithstanding the stipulation and the law on the subject the Idaho State Court refused (R. 186) to abide by the stipulation, refused to take judicial notice of the laws of the State of Washington as shown by the Statutes of that State, and the decisions of its Courts, and held:

“The record does not disclose what the law of Washington is with respect to this question. Proceeding on the theory that it is the same as in Idaho, we hold the Washington Court did not have jurisdiction to try and determine the question as to whether Pelkes held the stock involved in this suit in trust for Mrs. Mason.
 * * * ” (R. 187).

Clearly this was error on the part of the Idaho Court, but error relating solely to a question of procedure in its own courts and under its own laws. The Supreme Court of the United States obviously could not grant certiorari to review such a decision. Had the relevant laws of Washington been proved in that case as required by the Supreme Court of Idaho, that Court presumably would have ruled otherwise and would have granted to the Washington judgment the full faith and credit required by the Constitution. A question of local procedure only, and not a Federal question, being involved, certiorari was presumably correctly denied. This problem is discussed in Volume 11, of Black on Judgments, (2nd Edition) section 860, in the following language taken from a decision of the U. S. Supreme Court:

“Upon principle, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the laws of that state must be proved like any other matter of fact. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the

Union, because those laws are known to the court below as laws alone, needing no averment or proof. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it, while the law of that state, being known to its courts as law, is of course within the judicial knowledge of this court at the hearing on error, yet as, in the State Court, the laws of another State are but facts, requiring to be proved in order to be considered, this Court does not take judicial notice of them, unless made part of the record sent up. But the question of taking such judicial notice (as distinguished from the question of giving to the judgment all the faith and credit it is entitled to) *is not a federal question*, but entirely one of local law."

Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535.

The condition stated in the case of *Worcester v. Riley* (58 Sup. Ct. Rep. 185, 188) that:

"differences in proof and the latitude necessarily allowed to the Trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses might lead an appellate court to conclude that in none is the judgment erroneous,"

was plainly before this Court, and since it had no power to review a State Court's decision for errors where no Federal question was involved, certiorari was necessarily denied. But that is not authority for the following conclusion of respondents:

"Even if the Idaho Court had misapprehended the Washington law, its judgment became final and conclusive in Idaho and was and is equally conclusive on the Courts of Washington and the Federal Courts." (Page 20, Respondents' Brief.)

If the Washington judgment (the decree of May 31, 1935) was, as we assert, a final judgment by a court that had prior, continuous and exclusive jurisdiction of the subject matter and the parties, *no* judgment of *any* court could supersede it. It was entitled to full faith and credit in all courts subject to proper proof of the judgment and the jurisdiction of the Court that rendered it as their several laws might require.

Respondents insist on the one-sided proposition that only the Idaho State Court's judgment is *res judicata*, even though rendered on an erroneous conception of the relevant laws of Washington and cite the case of *Roche v. McDonald*, 275 U. S. 449, in support of that assertion.

However, while the Idaho case was pending, its jurisdiction in the premises was considered by the Washington court. That court, commenting on the proceeding initiated by T. R. Mason in the Idaho State Court action whereby he sought to enjoin Pelkes and also his wife Katherine Mason from continuing the Washington proceedings in probate, said (R. 292-293):

"I find that proceeding to be factitious, not prosecuted in good faith, and that *the Idaho court was without jurisdiction* to enjoin John Pelkes, an officer of this court, from taking such steps as may be necessary or proper in the discharge of his functions as such officer. Neither was there jurisdiction, in view of the scope of the Idaho action, to enjoin Katherine Mason, a claimant to property of an estate in process of administration by this court from participating in the disposition and closing of the estate."

That clearly was a denial of jurisdiction in the Idaho court since, if that court had jurisdiction of the action at all, it had jurisdiction to do whatever it deemed to be necessary in the premises. Petitioners could with perfect propriety cite the *Roche v. McDonald* case (*supra*) in their sup-

port. We feel that the decision of the State Court of Idaho, was erroneous; that it erred in refusing to be bound by the stipulation of the parties on the trial that judicial notice of the Washington laws and decisions might be taken and consequently erred in its interpretation of Washington law but there is nothing that this Court can do about it unless it decides in favor of the jurisdiction of the United States District and Circuit Courts to entertain the present interpleader proceeding. Failing that, we arrive at the impasse suggested in the *Worcester County v. Riley* case: *i. e.* the existence of two conflicting decisions upon the same issues between the same parties in two different States.

This "conflict of decisions of the Courts of two States, which the Constitution does not forestall" (*Worcester v. Riley, supra*, page 274 in the L. Ed.) actually exists in the present litigation.

If not "forested" by the Constitution no Federal question arises by reason of such conflict and this Court is "stalled" as far as deciding the merits of said conflict since it has no power to review the decisions of State courts where no Federal question is involved.

From page 20 to the end respondents devote their argument to the proposition that the first decree of distribution of the Washington court, sitting in probate, dated August 9, 1923, by the omnibus clause mentioned closed the estate and cut off any further jurisdiction of the Court in those proceedings.

There is nothing further from the truth.

At page 20 of petitioner's opening brief the case of *In Re Dyer's Estate*, 161 Wash. 498, 297 Pac. 196 was cited in support of the proposition that:

"The Superior Court, sitting in probate, has continuing jurisdiction to compel the executor to account for assets which it is contended he has not distributed."

In that case, which closely parallels the instant one, it appears that:

“In the course of the administration he (the administrator) filed a final account and petition for distribution, and, on the day fixed for the hearing, of which statutory notice was given, the court made and entered an order approving the final account and decreeing distribution of the property.” (Parentheses ours.)

The petitioner therein appeared and demanded that the decree be set aside, and that a certain 200 shares of capital stock of a certain Dredging Corporation be inventoried and administered upon. It appears that the petitioner knew of this stock before the filing of the final account. The administrator claimed that the approval of the final account and the decree of distribution closed the estate and that petitioner was estopped from maintaining the proceedings.

The court said:

“There is some argument in the briefs and some suggestion was made by the trial court to the same effect, that, while the decree of distribution was not *res judicata*, as the stock, nevertheless, as was now too late to inject that matter into this administration, but that an administrator *de bonis non* would be required. With this we do not agree. *This administration is not closed.* The administrator has not been discharged. So far as power of the court in that respect is concerned, there is as much now for taking charge of additional assets as there was at the time the formal inventory was filed, or at any time since the administrator qualified. Notwithstanding the order approving final accounts and decreeing distribution of property mentioned and described in the inventory and decree, the administrator has not yet filed any receipts from the beneficiaries or distributees under the will, nor has he been discharged. Rem. Comp. St. Par. 1533, among other things, provides: ‘Upon the production of receipts from the beneficiaries or distributees for their portions

of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.' To the same effect: 'the approval of such final account does not determine the administration.' *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602. 'The decree of distribution does not operate to relieve the appellant of his trust,' etc. *McCloughlin v. Barnes*, *supra*, State ex rel. Reser v. Superior Court, *supra*." (Italics supplied.)

Cases which were cited to the Superior Court of Washington in the Dyer brief from Missouri, Missouri being the State from which Washington borrowed much of its probate code, are two: *Ewing v. Parish*, 128 S. W. (Mo.) 538 (St. L. Ct. of App. (Mo.)), the syllabus of which reads:

"Although the judgment of the probate court on the final settlement of the administrator provided that the filing of the receipts from the distributees should be in full discharge of all funds held by him, where no receipts were filed by him because the distributees contested the settlement, the administrator continued to be such so as to recover assets unknown to him at settlement."

State ex rel. Noll v. Noll, 189 S. W. (Mo.) 582, the syllabus of which reads:

"The case of *Ewing v. Parrish*, 128 S. W. 538, cited by appellant, is not an authority for her position because in that case the probate court merely approved the final settlement, *but made no order discharging the administrator. Until that order is made the estate is not closed and hence the final settlement is not a binding judgment.*"

No omnibus clause, especially where the State has an interest in inheritance taxes, can avoid the jurisdiction of courts. It is to be noted that Katherine Mason herself, in the Washington Probate case, interested the State of

Washington in the tax question. Moreover, when the jurisdiction of a probate court is once invoked, the heirs may not by agreement amongst themselves, withhold a portion of the estate from administration, and, since both the court and State are interested parties, upon its being ascertained that there is additional property, administration must thereupon be had upon it.

Sec. 1462 *et seq.* Rem. Rev. St.: *Clark v. Clay*, 31 N. H. 393, 401-2; *Dantz, executor, v. Cooper*, 96 S. W. (Ky.) 454.

Blowing hot and cold is not looked upon with favor by the courts.

We have here an excellent illustration of that kind of proceeding. Respondents claim that the decree of distribution of 1923 (by way of its omnibus clause) operated to close the estate finally. That they did not think so while their action was pending in the Idaho State Court is clear from the language of Judge Lindsley in his "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor" (R. 282). We quote from this order (R. 288-289):

"While the aforesaid action was pending, Katherine Mason filed in this court and cause a petition praying the removal of John Pelkes as executor of the will and estate of Amelia Pelkes and the appointment of an administrator with the will annexed to complete the administration of the estate. In that petition, which was verified by her, she alleged the probate of the will of Amelia Pelkes in this court, the appointment of John Pelkes as executor, the making of the decree of distribution, and the distribution of certain property of the estate to her and to John Pelkes, and that '* * * no proceedings were ever had or have been had to finally close said estate and that said executor has never received a discharge nor filed any receipts from your petitioner for her distributive share of said estate.'

The petition further alleged that amongst other property of the estate of Amelia Pelkes were 30,598 shares of the Sunshine Mining Company, a number of shares of other mining companies, specifically describing them and \$10,024 in cash; that none of that property was inventoried or administered upon although the property '* * * and all of it was an asset belonging to the estate of said Amelia Pelkes, deceased, and subject to probate in the above entitled court and proceeding.' and that

'* * * the said John Pelkes, executor of said estate, has wasted and/or embezzled all of said property and that he has committed a fraud upon the estate and that he now is incompetent to act.'

Other matters were alleged for the purpose of showing the incompetency of John Pelkes further to act as executor, e. g. his age (84 years), infirm health, removal from the State of Washington, neglect of his duties. Then it was alleged: 'That under the terms of said will aforesaid, your petitioner is entitled to have distributed to her an interest in each and all of the property and effects as hereinbefore particularly described and that it is necessary that in order to complete the probate of said estate aforesaid, that some competent person be appointed as the administrator with the will annexed and of said estate. Your petitioner, being a daughter of said decedent and entitled under the terms of said will as aforesaid to share in said estate, and that upon the revocation of letters testamentary heretofore issued to the said John Pelkes, your petitioner requests that letters of administration with the will annexed issue to the said C. Harold Easter.' "

As a result of these further administration proceedings additional inheritance tax was paid the State. (Page 628 unprinted record.) Respondents at page 21 cite three California cases as authority for their claim that the decree of distribution closed the estate and that the omnibus provision was sufficient to pass title to uninventoried property. Those

cases are not applicable here. Paragraph 1533 of Rem. Rev. St. in force and effect throughout this litigation was enacted in 1917 and subsequent to the decision of *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231, on which respondents rely. That paragraph provides (R. 65):

“* * * Upon production of receipts from the beneficiaries or distributees for their portion of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.”

But the most carefully considered, well-reasoned discussion of the subject is found in the return of Judge Hawkins, in which he discusses the probate laws of the State of Washington, as follows:

“It is the opinion of this court that the Superior Court of the State of Washington in and for Spokane County, while sitting in probate, had exclusive jurisdiction over the estate of Amelia Pelkes, the assets thereof, the heirs, and all disputes between them involving title to those assets, until the entry of the decree of that court on May 31, 1935, and that it was its duty upon the issues presented to it, to inquire into whether or not a partition agreement had been entered into between John Pelkes and Katherine Mason subsequent to the entry of the decree of distribution on August 8, 1923, and to ascertain the terms thereof, adjudicate the rights of the parties arising from such agreement in the assets of the estate, including the stock in the Sunshine Mining Company, and compel the heirs to file accurate receipts showing the property they had received under the partition agreed upon between themselves, and that, until this was done, *the court had continuing jurisdiction not only of the heirs, but also of the property of the estate, and that it was a court of exclusive jurisdiction, so that no other court had the power to hear any controversy between those heirs relating to that property; and that the aforesaid decree of that*

court was a final adjudication in rem which prevented all other courts from entertaining litigation between Katherine Mason and John Pelkes or their privies involving any claims to the stock of the Sunshine Mining Company conflicting with that decree.

It is my opinion that these proceedings were entirely regular and in conformity with the procedure laid down by the statutory law of this state. In substance, the plaintiffs have relied on these proceedings in the amended complaint now before me, and it is my opinion that they have stated a cause of action entitling them to a decree quieting title in the stock now in the possession of the receiver of this court, unless their allegations are refuted. This being true, I am confronted with the problem of whether or not I may relinquish or transfer jurisdiction over property which is within the territorial limit of my court and within the possession of an officer of my court, and in which a litigant before me has, in my judgment, established a prima facie title. * * * But the doubt still remains in my mind that I have the power to divest myself of a jurisdiction which I have acquired over property which is impounded by an officer of this court.

It is further my opinion that, upon the institution of the action which is now pending before me and the appointment of J. C. Cheney as receiver of this court and his impounding of the stock as such, this court became a court of exclusive jurisdiction, proceeding in rem to determine title to property which was in the possession of its receiver, and that for the reason of such determination it has acquired jurisdiction of all the parties defendant in the action now pending before me, and that for that reason it is doubtful whether any other court, including this Honorable Court, has jurisdiction to determine the rights of these parties in that property." (Italics supplied.) (Hawkins' Answer R. 40, 41, 42.)

The *Cogswell* case (189 Wash. 433) cited by respondents is in no sense contradictory. In that case the appellants sought a declaratory judgment in the estate proceedings at

a time long after the property had been distributed finally and the estate closed. Cogswell's will was admitted to probate in 1919. In 1933 Mrs. Cogswell filed a *final* report and petition for distribution as permitted by Rem. Rev. Stat. sec. 1462. Between 1919 and 1933 Mrs. Cogswell had sold various pieces of real property held by her under the will.

The Court said "It is a reasonable inference that Mrs. Cogswell petitioned for a final decree in order to perfect the title of her vendees."

It decreed that the property already sold be set aside to Mrs. Cogswell and that the purchasers from her should receive the benefit of her title. It dealt with property already administered under the will. As to it the estate had been closed and the court ruled that it had lost jurisdiction to make a different disposition in the proceeding then before it.

In sub-paragraph 4, page 26, of Respondents brief objection is made to petitioner's claim that the decisions of the Supreme Court of Washington in the prohibition cases brought against Pelkes by the Masons support the jurisdiction of the Superior Court, sitting in the probate proceedings herein frequently referred to. As stated by respondents, petitioner cites as authority for her claim Judge Hawkins' answer in the present action (R. 15, 22) as quoted by respondents but it appears in the unprinted record on file herein at pages 479 to 485 that the Masons directly challenged the jurisdiction of the Superior Court of the State of Washington alleging:

"That the said Superior Court of the State of Washington in and for the county of Spokane, is now and at all times has been without jurisdiction and without any authority to hear and/or try and/or determine the rights of this petitioner, and the said John Pelkes, arising out of said contract as hereinbefore alleged, and that said court is without jurisdiction in said estate proceeding to make any order of any kind, nature and/or description which would in anywise be binding

upon the prosecution of the action in any forum, and that said court was at all times herein mentioned and now is without jurisdiction to make any valid restraining order, either temporary or an injunction pendente lite, which in any manner affects the procedure of this petitioner in said Idaho action."

"That said Superior Court of the State of Washington, in and for the County of Spokane, has no authority whatsoever to attempt a hearing and/or trial of the rights of your petitioner and the said John Pelkes in that certain action now pending in said Superior Court and which action is entitled No. 15,496, in the Matter of the Estate of Amelia Pelkes, deceased."

It is reasonable to assume that if respondents were correct in their contentions in the Washington Supreme Court on the question of the jurisdiction of the Superior Court prohibition would have been granted. However it was denied.

Respondents at page 27, sub-paragraph 5, of their brief, urge the correctness of the decision in the United States District Court with respect to its analysis and findings on the Washington State law relative to the continuing jurisdiction of the Superior Court sitting in probate in the Pelkes Estate.

That decision relies largely on the case of *In Re Thompson's Estate*, 110 Wash. 635, 188 Pac. 784 (R. 333). That case, and also the case of *In Re Decker's Estate*, 105 Wash. 221, 177 Pac. 718, are distinguishable from the controlling case of *In Re Dyer's Estate*, *supra*, inasmuch as they involve disputes and controversies between third parties over private contracts or assignments in which the estate is not directly interested. They present questions which cannot be litigated in probate proceedings under any theory. They do not involve the adjustment of disputes between the heirs; the filing of receipts by the heirs or the question of the discharge of the executor or the closing of the estate, or the disposition of unadministered property.

Reagh v. Dickey, 183 Wash. 564, 48 Pac. (2nd) 941, is authority only for the well recognized proposition that a

decree entered by a probate court is as final and conclusive as any other decree unless affected by appeal. Certain California decisions have been cited at various times to the effect that an omnibus clause in a decree of distribution fixes title to property under probate proceedings. These cases are not applicable to the present case as the property herein was not inventoried, and so far as the administration was concerned, it must be treated either as recently discovered or as non-existent property, or, in any event, as unadministered assets; consequently, the present case falls within the rule enunciated in *In re Dyer's Estate, supra*.

Another limitation on the power of the Federal courts in interpleader proceedings may exist in the interference by these courts with the probate proceedings of a State. Thus in *Asher v. Bone*, 100 F. (2d) 315 (C. C. A. (1938)), it was held that a Federal court has no power to interfere with a decree of distribution of a State court under a will. It would not seem that the Federal Interpleader Act could be used as a means of defeating the purpose of that rule. If it can be held that the suit in the Superior Court of Washington for Spokane County was one under the probate proceedings started in 1923, it would necessarily follow that the Federal court in Idaho could not interfere with that proceeding and that it had no jurisdiction to determine by interpleader or otherwise, issues clearly within the Washington court's jurisdiction. In that connection, see *Kline v. Burke Construction Company*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. Ed. 226 (1922), where it was held that in actions *in rem* neither State nor Federal courts can exercise jurisdiction over the *res* after the jurisdiction of the court of the other sovereignty has attached to it.

Accordingly, it may well be argued in the present case that the United States District Court for the District of Idaho had no jurisdiction to entertain the interpleader action of the Sunshine Mining Company, first because the

statute invoked does not confer the power on the Federal courts to decide as between conflicting State decisions, and second because the statute is not intended to vest power in the Federal courts to interfere with the probate proceedings of a State court, contrary to the Federal law as established by the cases.

Assuming that the United States District Court for Idaho properly could consider the case before it on an action of interpleader, the further question is presented as to what effect should be given the conflicting State decisions of Washington and Idaho. It is a cardinal principle of conflict of laws that a judgment of a court of competent jurisdiction shall be given full faith and credit in the courts of all other States and in the Federal courts. This rule is derived from article 4, section 1 of the Constitution of the United States, and the Revised Statutes, Section 905, enacted thereunder. The rule has one qualification, namely, that the court rendering the judgment in question must have had jurisdiction over the controversy before it. Thus a judgment is open to collateral attack on jurisdictional grounds in the courts of another State and in the Federal courts, *Murray v. Magnolia Petroleum Company*, 23 F. (2d) 347 (D. D. N. D. Tex., 1927). Generally a Federal court must follow the decisions of the courts of the State in which it sits, *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1937). However, there is another rule which requires a Federal court to give a State judgment the same effect it would have under the laws of the State where rendered, *Mitchel v. Cunningham*, 8 F. (2d) 813 (C. C. A. 9, 1925).

Under this rule, the district court must give effect to the Washington judgment as well as the Idaho judgment. Confronted with these rules and two conflicting judgments, it is submitted that the court's duty should have been plain, namely to investigate and ascertain for itself, (1) if the

State judgments were rendered upon a proper jurisdictional basis, and (2) which court had prior jurisdiction. It is likely that the full faith and credit clause would require recognition of both judgments, if properly founded.

It is clear, however, that both State courts could not have jurisdiction in equal degree over the same controversy. Therefore, one of them must take priority over the other. It is further submitted that the pronouncements in either judgment, as to which State has jurisdiction, should not be taken as determinative of the issue.

The Supreme Court has said in *Titus v. Wallick*, 83 L. Ed. (advance sheets) 539 (1939), that it is not bound by the decision of the State court on matters affecting the right to have the judgment accorded full faith and credit, especially where the decision is founded not on local laws but upon the law of a foreign State, which can as readily be determined in the Supreme Court as in the State court. See also to the same effect *Adam v. Saenger*, 303 U. S. 59, 58 Sup. Ct. 454, 82 L. Ed. 649 (1938). Thus it can be argued that the Federal court has the right and the power to go behind both judgments to ascertain for itself which one shall be accorded full faith and credit in the Federal courts. The Circuit Court of Appeals in the present case pointed out that the question of jurisdiction was before the Idaho court, and that that court had decided that Washington was without jurisdiction. The court then said the point could not be relitigated. However, in view of the statement of the Supreme Court in *Titus v. Wallick*, *supra*, it is submitted that Idaho's decision determining that Washington had no jurisdiction is not binding on the Federal court. This being so, that court must determine for itself whether or not Washington had jurisdiction. Such determination would require a study of the Washington statutes and their interpretation by Washington cases. This the Circuit Court of Appeals did not do. The decision of the circuit court in

effect construes the statutes of the State of Washington without a study of Washington cases interpreting them. The result reached gives a different effect to those statutes than that accorded by the Washington courts. This is contrary to established law as laid down by the Supreme Court in many cases. The rule is that in the absence of any Federal question the Federal courts are bound by the decisions of State courts construing their own statutes. *McCain v. Des Moines*, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936 (1899); *Edward Hines, Yellow Pine Trustee, v. Martin*, 268 U. S. 458, 45 Sup. Ct. 543, 69 L. Ed. 1050 (1925); *Chesapeake and Ohio Railroad Company v. Public Service Commission of West Virginia*, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. Ed. 520 (1917); *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); *Oates v. First National Bank*, 100 U. S. 239, 25 L. Ed. 580 (1879); *Smith v. Kernochen*, 7 How. 198, 12 L. Ed. 666 (1849).

Further, the Supreme Court has held that it will adopt the construction put upon administration laws of a State by the highest court of that State. *Security Trust Company v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147 (1902); *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536 (1875). Therefore, it is submitted that under the principles outlined above, the failure of the Circuit Court of Appeals in the present case to look into the matter of jurisdiction as established by the Washington statutes and decisions constitutes reversible error on the part of the court.

Respectfully submitted,

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Counsel for Petitioner, Evelyn Treinies.

AFRED C. SKAIFE,

Of Counsel.



BUCKINGHAM MINING COMPANY, INCORPORATED
OF THE STATE OF MONTANA
PLAINTIFF
VS.
JOHN J. BUCKINGHAM, JR.
DEFENDANT

STATE OF MONTANA,
BUCKINGHAM MINING COMPANY

ON PETITION FOR WRIT OF HABEAS CORPUS
AND FOR WRIT OF HABEAS CORPUS FOR THE
NINTH CIRCUIT

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I OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 99 Fed. Rep. (2d Series) 651, and the opinion of the District Court of the United States for the District of Idaho is reported in 19 Fed. Supp. 587. The opinion of the Supreme Court of Idaho is reported in 59 Pac. (2d) 1087. Certiorari denied January 11, 1937. 299 U. S. 615, 57 S. Ct. 319, 81 L. Ed. 453.

II STATUTES INVOLVED

Federal Interpleader Act, Title 28 U. S. C. A., Sec. 41, Subdivision 26, entitled "Original Jurisdiction of Bills of Interpleader and Bills in the Nature of Interpleader" enacted January 20, 1936, Chap. 13, Sec. 1, 49 Statutes at Large, 1096, is the statute involved and under which the respondent, Sunshine Mining Company, filed its bill of interpleader.

III GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED

The respondent, Sunshine Mining Company, being a Washington corporation and doing business in the state of Idaho, filed its bill of interpleader in the District Court of the United States, for the District of Idaho, Northern Division, on the 17th day of March, 1937, under and pursuant

to the Interpleader Act hereinabove referred to. Defendants named in the bill of interpleader were Evelyn H. Treinies, Seattle First National Bank (Spokane and Eastern Branch), administrator with the will annexed of John Pelkes, deceased, A. W. Hawkins, as Judge of the Superior Court of the State of Washington in and for Yakima County, and J. C. Cheney, as Receiver, who were all citizens of the state of Washington, and Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Jane Doe Hanson, husband and wife, and F. C. Keane, all citizens and residents of the state of Idaho, residing within the jurisdiction of the United States District Court, for the District of Idaho, Northern Division.

The Sunshine Mining Company alleged in its bill of interpleader the diversity of citizenship of said defendants; that there were adverse claims of ownership being made to 16,000 shares of its stock and the dividends accrued and accruing thereon; that the Sunshine Mining Company was a disinterested stakeholder; and that the amount in controversy exceeded the sum of \$3,000.00. All of the allegations in said bill of interpleader as to diversity of citizenship and amount involved were admitted by the respective defendants. All of the defendants appeared generally in said action. A. W. Hawkins, as Judge, and J. C. Cheney, as Receiver, made their answer and return to

the bill of interpleader. Evelyn H. Treinies and the Bank, as administrator, and Katherine Mason and her husband, and the remaining defendants filed their answers and cross-complaints setting up their respective adverse claims of ownership to the stock and dividends.

IV

STATEMENT OF THE CASE

The respondent, Sunshine Mining Company, feels that a more complete and detailed history and background to this litigation should be set forth than that contained in the statement of the case made by the petitioner herein.

The respondent, Sunshine Mining Company, has been involved in this litigation since August 4, 1934, for no other reason than that it is the corporation which happened to issue the stock which is the subject matter of this controversy. Its only interest in this litigation has been to recognize the rightful owner of the stock. Since the 4th day of August, 1934, the litigation between Katherine Mason and her husband, on one side, and John Pelkes and Evelyn H. Treinies, on the other side, has raged back and forth in the state courts of Idaho and Washington. The respondent, Sunshine Mining Company, being a Washington corporation and all of its mining property being located in the state of Idaho, necessarily has had to qualify with the laws of the state of Idaho to transact business therein as a foreign

corporation. As a result of this situation, the respondent has been subject to the jurisdiction of the state court of Washington and of the state court of Idaho, and has been made a party defendant in the various suits that have been instituted and maintained in the two state courts. In order that the various steps taken may be before the court for its consideration, the respondent, Sunshine Mining Company, will review the cases and give their status as concisely as possible as of March 17, 1937, the date on which the Sunshine Mining Company filed its bill of interpleader in the District Court of the United States, for the District of Idaho.

IDAHO CASES

1. On August 4, 1934, Katherine Mason and T. R. Mason filed suit in the Idaho State District Court for Shoshone County, against John Pelkes, Evelyn H. Treinies, Pierre Thinnies, Frances Thinnies and Sunshine Mining Company. (R. 126). In her complaint Katherine Mason alleged that she was the owner of 15,299 shares of stock of the Sunshine Mining Company, being one-half of the 30,598 shares of stock formerly owned by her step-father, John Pelkes, and her mother, Amelia Pelkes. She further alleged that her step-father had agreed to hold one-half of said original 30,598 shares of stock in trust for her and to deliver the same to her and account for the dividends paid thereon upon her demand. She further alleged that all of

said original block of stock had been transferred and disposed of by her step-father, the last portion of said stock, consisting of 16,000 shares, having been transferred to Evelyn H. Treinies, who took the same with notice of the rights of Mrs. Mason. (R. 127). The Sunshine Mining Company was made a party to this suit and an injunction pendente lite was issued enjoining the company from transferring the stock or paying any dividends thereon pending the determination of the action. All parties appeared generally in said cause, the defendant, John Pelkes, alleging, among other things, as a defense to said action, the proceedings in the Superior Court of the state of Washington which will be later referred to. (R. 129-139). The trial of said cause was had before the Honorable Miles S. Johnson, and on the 24th day of September, 1935, he rendered his decision whereby he determined Katherine Mason to be the owner of 7649 shares and Evelyn H. Treinies to be the owner of 8351 shares of said stock. Findings of fact (R. 152) and conclusions of law (R. 163) and decree (R. 165) were entered pursuant to said opinion. By the decree entered Katherine Mason was decreed to be the owner of 7649 shares of said stock and Evelyn H. Treinies was decreed to be the owner of the balance of 16,000, or 8351 shares. Pierre Thinnes and Frances Thinnes were dismissed out of the case prior to trial. This judgment and decree further restrained and enjoined the defendants, and each of them, from commencing or taking any further proceedings

in the Superior Court of the State of Washington in the matter of the Estate of Amelia Pelkes, deceased, or in any court with reference to the subject matter of the action or with reference to the relief given to the parties, and permanently enjoined them from taking any proceedings except by appeal to the Supreme Court of the state of Idaho. (R. 167).

2. This judgment and decree was appealed to the Supreme Court of Idaho, Pelkes and Treinies and the Sunshine Mining Company appealing and the Masons cross-appelling. (R. 169).

3. The Supreme Court of Idaho determined the appeal on the 23rd day of July, 1936, modifying the decision of the State District Court and holding that Katherine Mason was the owner of 15,299 shares of said stock, and likewise holding that Pelkes and Treinies be required to account for the dividends collected by them on this stock. (*Mason v. Pelkes*, 59 Pac. (2d) 1087). (R. 167). This opinion affirmed the opinion of the Idaho State District Court restraining the parties from proceeding further with litigation in Washington. (R. 172).

4. On the 18th day of August, 1936, after the remittitur came down from the Supreme Court of the State of Idaho, findings of fact (R. 192), conclusions of law (R. 205) and decree (R. 207) on the remittitur were entered in the State District Court. This judgment decreed that Kather-

ine Mason was the owner of 15,299 shares of Sunshine Mining Company stock in controversy and directed the Sunshine Mining Company to recognize her ownership to said stock. It likewise gave judgment in favor of Katherine Mason and her husband, T. R. Mason, against John Pelkes and Evelyn H. Treinies for \$19,429.73, and directed that execution issue therefor. The judgment further enjoined all of the defendants from taking any proceedings in courts anywhere with reference to the subject matter of this action and the relief given the plaintiff save and except for taking additional proceedings for the protection of their rights in said action. (R. 209).

5. John Pelkes and Evelyn H. Treinies then filed their petition for injunction and supersedeas pending petition for certiorari in the Supreme Court of the United States and, as a part of said petition, it was alleged that Evelyn H. Treinies and John Pelkes had surrendered the stock involved in said litigation into the registry of the Idaho state court. Subsequently and on the 22nd day of August, 1936, an injunction pending petition for certiorari was granted.

6. Pelkes and Treinies then filed their petition for writ of certiorari which was later denied by the Supreme Court of the United States January 11, 1937. (57 S. Ct. 319; 299 U. S. 615).

WASHINGTON CASES

It is necessary to give a brief history of the proceedings in the Amelia Pelkes Estate in order to set forth clearly the background of the Washington litigation as it existed on March 17, 1937.

John Pelkes and the mother of Katherine Mason, Amelia Pelkes, were married about 1889. At that time Mrs. Pelkes' daughter, now Katherine Mason, was of the age of about eight or nine years, and she continued to reside with her mother and Mr. Pelkes until the time of her marriage. A number of years prior to Mrs. Pelkes' death, which occurred in 1922, she and her husband moved to Spokane, Washington, where they resided at the time of her death. (R. 173). A few years prior to Mrs. Pelkes' death a conversation was had between Mr. and Mrs. Pelkes and Katherine Mason, in which it was explained to Katherine Mason that they were getting along in years and desired her to know what disposition they were making of their property by will. She was told that if her mother died first she, Mrs. Mason, was to receive her mother's half of the property, but if Mr. Pelkes died first all of the property was to go to Mrs. Pelkes and on her death it was to all go to Katherine Mason; and in the event that Mr. Pelkes died, if his wife had predeceased him, Mrs. Mason was to get all of his estate with the exception of \$5,000.00 which he wanted to divide among some of his nieces and nephews and a

sister in the Old Country. (R. 173).

After Mrs. Pelkes' death, Mrs. Mason and Mr. Pelkes read the last will and testament of Amelia Pelkes and found that it provided that half of her estate, which would be one-fourth of the community property, was to go to John Pelkes, and the other half of her estate, or one-fourth of all the community property, was to go to Katherine Mason. This, apparently, was not in accordance with the wishes of the deceased as understood by Mr. Pelkes and Mrs. Mason. (R. 174).

The will of Amelia Pelkes was admitted to probate in the Superior Court of Spokane County, Washington, on May 1st, 1922. (R. 264). An inventory of the estate was returned and filed, but no mining stock was included in that inventory for the reason that it was thought to be valueless at that time. Subsequently, and on August 9, 1923, a final decree of distribution was entered in the estate matter, whereby one-half of the decedent's property was distributed to John Pelkes and one-half thereof to Katherine Mason, and, by this decree of distribution, John Pelkes became the owner of an undivided three-fourths interest of the community property and Mrs. Mason became the owner of an undivided one-fourth interest. The decree also covered not only property described in the inventory and estate proceedings but "all other property not now known or described which may belong to said estate". (R. 123).

Following the decree of distribution Mr. Pelkes removed to Kellogg, Idaho, to live with his daughter, Mrs. Mason, and her husband, and at that time an agreement was entered into between Mrs. Mason and Mr. Pelkes, the substance of which gives rise to this controversy.

Mr. Pelkes contended that he agreed with Mrs. Mason that she should have one-half of the property except for the mining stock instead of one-fourth thereof which she was entitled to under the terms of her mother's will, and he was to have the other half of said property and all of the mining stock, and that a division was made by them in conformity with that agreement. On the other hand, Mrs. Mason claimed that she was to have one-half of all the property, including one-half of the mining stock, and that division was made on that basis, except that all of the mining stock was to be held by Mr. Pelkes in his name, he to account for her one-half of the stock when it became of value and at such time as she demanded it. (R. 177-178). Mrs. Mason further contended that this arrangement continued until on or about November 8, 1933, when she learned that Mr. Pelkes had assigned and transferred 16,000 shares of stock, being all of the stock of the Sunshine Mining Company which he owned on that date, to Evelyn H. Treinies.

Shortly following this time and on August 4, 1934, Katherine Mason instituted suit in the Idaho Court herein-

above referred to. (R. 126). After the entry of the decree of distribution in the matter of the estate of Amelia Pelkes, deceased, in the Superior Court of Spokane County, Washington, on August 9, 1923, Mr. Pelkes and Mrs. Mason looked upon and treated the probate proceedings as closed until about the time Mrs. Mason started her suit in the Idaho Court.

1. With the probate record in the Washington Court in this status and with Mrs. Mason's action pending in the Idaho Court, she, on or about the 19th day of December, 1934, filed her petition in the probate proceedings alleging, among other things, that 30,598 shares of the capital stock of the Sunshine Mining Company had not been inventoried or probated and that it was an asset belonging to the estate and subject to the probate proceedings, and further requesting that Pelkes, as executor, be removed and that letters of administration be issued to some competent person. (R. 214). A citation was issued on this petition and Pelkes filed a return and cross-petition, wherein he alleged that he was the sole owner of the stock. (R. 217). Thereafter and before any hearing was had on the petitions, T. R. Mason, husband of Katherine Mason, who was not a party to the proceedings in Washington in the matter of the estate of Amelia Pelkes, deceased, filed a petition in the Idaho action, wherein he prayed for an order of the Idaho State Court restraining John Pelkes and Katherine Mason,

their agents and attorneys, from proceeding with the litigation pending in the state of Washington, in the matter of the estate of Amelia Pelkes, deceased. On May 21, 1935, an order as entered in the Idaho State Court restraining said parties from taking any further proceedings in the Washington Court until the further order of the court. (R. 238).

While that order was in effect and on the 31st day of May, 1935, an order was entered in the matter of the estate of Amelia Pelkes, deceased, in the Superior Court of Spokane County, Washington, entitled "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares, and Discharging Executor". This order purported to adjudicate John Pelkes to be the owner of said 30,598 shares of stock. (R. 282). This order did not however as stated on page 6 of petitioner's brief award the Sunshine stock to Pelkes' transferee, Evelyn Treinies, nor did it restrain the Idaho group from further litigating the matter in any court.

The Sunshine Mining Company was not a party in any of the estate proceedings, and no attempt was made to join the company in any of those proceedings. This order in the estate proceedings entitled "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares, and Discharging Executor" is the order which was pleaded, among other things, by John Pelkes as one of his defenses in the Idaho suit. (R. 129). Evelyn H. Treinies, however,

did not set up this order as a defense in her answer in the Idaho State Court. (R. 139).

2. On the 18th day of October, 1935, which was after the decision in the Idaho State Court and before the appeal thereon had been determined by the Supreme Court of Idaho, John Pelkes and Evelyn H. Treinies filed suit in the Superior Court of the State of Washington, in and for Spokane, Washington, against Katherine Mason, T. R. Mason, Lester S. Harrison, Walter H. Hanson, F. C. Keane, Richard S. Munter and Sunshine Mining Company. (R. 243). In this case the Sunshine Mining Company interposed its motion to quash, motion for change of venue and demurrer, and at the conclusion of the arguments on the motions and demurrer the attorneys for Pelkes and Treinies moved to dismiss said cause without prejudice, which motion was granted.

3. On the 12th day of August, 1936, which was less than a month after the Supreme Court of Idaho decided the case of *Mason vs. Pelkes* (R. 167), John Pelkes and Evelyn H. Treinies again filed suit in the Superior Court of the State of Washington, in and for Spokane County, against Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, Walter H. Hanson and Jane Doe Hanson, husband and wife, F. C. Keane and Sunshine Mining Company. In this case the following steps were taken (R. 256): (a) The Sunshine Min-

ing Company interposed its demurrer and motion for change of venue; (b) On January 11, 1937, an order was entered without notice purporting to appoint J. C. Cheney as receiver; (c) On January 19, 1937, the Seattle First National Bank (Spokane and Eastern Branch), as administrator with the will annexed of the estate of John Pelkes, deceased, and Evelyn H. Treinies, as plaintiffs, (Pelkes in the meantime having died) filed their amended complaint in said cause; (d) On February 5, 1937, said cause was transferred from Spokane County to Yakima County for further proceedings. (R. 256). Arguments were had in Yakima County before the Honorable A. W. Hawkins, Judge of the Superior Court of the State of Washington, in and for Yakima County, who took the matter under advisement.

At this time, March 17, 1937, the records in the Idaho and Washington state courts were in this status: There was a judgment and decree of the State District Court of Idaho which had been modified and affirmed by the Supreme Court of the State of Idaho which adjudged Katherine Mason to be the owner of said 15,299 shares of stock in the Sunshine Mining Company; on this judgment and decree of the Idaho Supreme Court, the Supreme Court of the United States had denied a petition for writ of certiorari; in the Washington State Court suit was pending against the Masons and the Sunshine Mining Company involving the same stock; whereby the estate of John Pelkes

and Evelyn H. Treinies were attempting to assert their ownership to the same block of stock, contrary to the decree of the Idaho Supreme Court and in violation of the injunction then in effect against them; in addition to this in the state of Idaho Katherine Mason and her attorneys were threatening the Sunshine Mining Company with receiver-ship proceedings and with damages unless the judgment in the Idaho Supreme Court was complied with (Ex. 8); in the state of Washington in the case of *Pelkes and Treinies v. Mason, Sunshine Mining Company, et al.*, and in which appointment of receiver without notice had been obtained, Pelkes and Treinies were seeking a money judgment for damages which they alleged they were entitled to by reason of the Sunshine Mining Company refusing to recognize Evelyn H. Treinies as the owner of said identical stock. (R. 256, Ex. 7). With the court records and facts existing as hereinbefore related, the Sunshine Mining Company on the 17th day of March, 1937, (R. 1), filed its bill of interpleader in the United States District Court for the State of Idaho, Northern Division, seeking to bring all the parties before one court, where an ultimate, final and binding adjudication as to the rights of ownership of this stock could be had, and seeking further in said court to restrain and enjoin all of said parties permanently from further litigation in any other court and from further vexing and harassing the Sunshine Mining Company with a multiplicity of suits in regard to this matter.

V

ARGUMENT

JURISDICTION OF FEDERAL DISTRICT COURT
UNDER INTERPLEADER STATUTE

The respondent, Sunshine Mining Company, will address itself first to the question of the jurisdiction of the United States District Court, for the District of Idaho, to proceed under the Interpleader Statute and its power to enter all of the orders, judgments and decrees which it has entered therein. At the outset it must be borne in mind that the Federal Interpleader Act in its present form was not enacted until the 20th day of January, 1936. Therefore, the charges in petitioner's brief that the respondent, Sunshine Mining Company, should have proceeded under the Interpleader Act at the outset of this litigation and before final judgment was entered in the Idaho Court are of no avail, for the reason that the Interpleader Statute was not available to this respondent at that time. The pertinent portion of the Interpleader Act enacted January 20, 1936, Chap. 13, Sec. 1, 49 Statutes at Large, 1096, Title 28, U. S. C. A., Sec. 41, Subdivision 26, provides that the district courts of the United States shall have:

"(26) Original Jurisdiction of Bills of Interpleader, and of Bills in the Nature of Interpleader—

"(a) Of suits in equity begun by bills of interpleader or bills in the nature of bills of interpleader duly veri-

fied, filed by any person, firm, corporation, association, or society having in his or its custody or possession *money or property* of the value of \$500.00 or more, or *having issued a note, bond, certificate, policy of insurance, or other instrument* of the value or amount of \$500.00 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or *being under any obligation written or unwritten to the amount of \$500.00 or more, if—*

“(i) Two or more adverse claimants, citizens of different States, are claiming to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy, or other instrument, or arising by virtue of any such obligation; and

“(ii) The complainant (a) has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court; * * *

“Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

“(b) Such a suit may be brought in the district court of the district in which one or more of such claimants resides or reside.

“(c) Notwithstanding any provision of Part 1 of this title to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any United States court on account of such money or property or on such instrument or obligation until the further order of the

court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.

"(d) Said Court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be necessary or convenient to carry out and enforce the same. * * * (*Italics ours*)

For the stakeholder or party to come under the provisions of this Act the following requisites must appear:

(1) The complainant filing a bill of interpleader must have in its possession money or property of the value of \$500.00 or more, or having issued a certificate or other instrument of the value of \$500.00 or more, or being under an obligation, written or unwritten, to the amount of \$500.00 or more; (2) There must be two or more adverse claimants, citizens of different states claiming to be entitled to such money or property; (3) The complainant must deposit such money or property into the registry of the court, there to abide the judgment of the court; and (4) The suit must be brought in the district court of the district in which one or more such claimants resides or reside.

It is apparent, therefore, that all of the jurisdictional elements are present in the case at bar to bring it squarely within the terms of the statute above cited.

First, the amount involved in this litigation exceeded many times the jurisdictional requirement of the Statute, and this fact was admitted by all parties. (R. 15, 27, 46 & 52)

Second, the necessary diversity of citizenship and a controversy between those citizens as required by the Interpleader Act existed. The Sunshine Mining Company is a citizen of the state of Washington within the meaning of the statute; the defendants, Katherine Mason and T. R. Mason, wife and husband, Lester S. Harrison and Grace G. Harrison, husband and wife, and Walter H. Hanson and Jane Doe Hanson, husband and wife, and F. C. Keane, are all residents and citizens of the state of Idaho within the jurisdiction of the United States District Court for the District of Idaho, Northern Division; Evelyn H. Treinies, the real party in interest, John Pelkes, administrator, J. C. Cheney, as Receiver, and A. W. Hawkins, as judge, were all citizens of the state of Washington. These facts were admitted by all parties. (R. 15, 27, 46 and 52). The necessary diversity of citizenship, therefore, cannot be questioned. Likewise, there can be no question but that a controversy existed between the defendants in the interpleader action over the ownership of the stock. Evelyn H. Treinies and John Pelkes, and now his administrator, have claimed and asserted throughout all of the litigation in the courts in both the state of Idaho and the state of Washington to be the owners of a block of 16,000 shares of stock in the Sunshine Mining Company. On the other side, Katherine Mason and

her husband claim to be the owners of 15,299 shares of the identical block of stock in the Sunshine Mining Company. Only casual examination of the various court records which comprise the evidence in this case is necessary to show that the interests of the parties were adverse in the extreme, and that each was claiming to be the owner of the identical property to the exclusion of the other.

Third, the complainant has deposited money or property into the registry of the court, there to abide the judgment of the court, and has asserted its absolute disinterestedness as to the fund or property. At the time the Sunshine Mining Company filed its bill of interpleader it deposited into the registry of the court \$19,123.75, and thereafter and on later dividend-payment dates again deposited substantial amounts of money into the registry of the court, and in addition to this the complainant likewise tendered into court for adjudication the rights of the parties to the 16,000 shares of stock. It is true that the Sunshine Mining Company did not deposit into the registry of the court at the time it filed its bill of interpleader the certificates of stock which were merely evidence of the ownership of stock in the company. It did not do this for the reason that Evelyn H. Treinies then had in her possession the original certificate which was issued to her at the request of John Pelkes, showing that she was the record owner of 16,000 shares of stock. However, this certificate had been can-

celled by the decree of the Idaho state court. (R. 166). It is likewise true that at the time of filing the bill of interpleader new certificates had been issued to Katherine Mason in lieu of the cancelled certificate to Evelyn H. Treinies to the extent of 15,299 shares, in accordance with the decree entered pursuant to the opinion of the Supreme Court of Idaho. (R. 167). These new certificates standing in the name of Katherine Mason were in her possession. The remaining 701 shares were in the possession of the clerk of the State District Court subject to a levy which had been made thereon by the Sheriff of Shoshone County, Idaho, to satisfy a judgment entered by the Idaho State Court against Pelkes and Treinies for the sum of \$19,429.73. However, all of these certificates of stock as such were not the stock, but simply evidence or indicia of ownership and, standing alone, do not constitute the stock in the company.

"It is well settled that a certificate of stock in a corporation is not the stock itself. It is the mere evidence of the holder's ownership of the stock and of his rights as a stockholder to the extent specified therein, just as a promissory note is merely the evidence of the debt secured thereby, and as title deeds are merely the evidence of the ownership of land. As said by one court, "A share of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share. These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights

and duties. They are muniments of title, but not the title itself."

Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 11, Sec. 5092, page 55.

To the same effect see *Thompson on Corporations, Third Edition, Vol. 5, Sec. 367, page 310.*

Regardless of the fact that the certificates of stock were not delivered into the registry of the court at the time of filing the bill of interpleader, the requirements of the Interpleader Statute are nevertheless complied with if the complainant has "issued a certificate * * * or other instrument of the value or amount of \$500.00 or more", and it, therefore, cannot be questioned but that the statute is satisfied on this ground. *However, all of the stock standing in the name of Evelyn H. Treinies and in the name of Katherine Mason and all of the dividends paid thereon were deposited and placed in the registry of the United States District Court for the District of Idaho before the court attempted to determine the issues. On the 15th day of May, 1937, on the motion of the respondent, Sunshine Mining Company, the court below entered its order requiring the petitioner, Treinies, to deposit into the registry of the court the certificate of stock standing in her name for 16,000 shares of stock. (R. 120). This order also required the respondents, Masons, to deposit into the registry of the court certificates for stock in their names totalling 15,299 shares, and \$42,225.24 cash received by them from dividends*

paid thereon. (R. 120). This order also restrained the Sheriff of Shoshone County, Idaho, from selling, disposing or in any way transferring the certificates of stock for 701 shares then in his possession until the further order of the Court. (R. 120). Also the order required the respondent, Sunshine Mining Company, to deposit into the registry of the court as declared during the pendency of such suit any further cash dividends on the 16,000 shares of stock. (R. 122). *All of the parties fully complied with this order without objection or exception.* (R. 120). *Thus, before the court attempted to determine the issues, the entire subject matter of this litigation was in the registry of the court.*

Fourth, the suit was brought in the District Court of the district in which one or more of the claimants reside or resides. The suit was instituted in the District Court of the United States for the District of Idaho, Northern Division, being the district in which most of the claimants resided. This fact was admitted by all parties.

It is, therefore, apparent that all of the jurisdictional elements which are required by the statute are present in the case at bar and bring it squarely within the terms of the interpleader act.

The question of jurisdiction of the District Court to proceed under the Interpleader Act was very aptly stated in the opinion of the Circuit Court of Appeals, Ninth Circuit.

"The stock in controversy had a value of more than \$500.00. Prior to filing its bill, the company had issued certificates for the stock and was under an obligation to pay the rightful owner thereof accrued and accruing dividends thereon. Accrued dividends, at the time of filing the bill, amounted to more than \$500. The company, at that time, paid the then accrued dividends into the registry of the court, there to abide the judgment of the court. Dividends subsequently accruing were likewise so paid. Also, while the suit was pending, certificates representing the stock in controversy were deposited in the registry of the court. Appellants (Treinies, the administrator and the receiver) claimed the stock and dividends adversely to the Masons. The Masons were citizens and residents of Idaho. Appellants were citizens and residents of Washington. Clearly, therefore, the court had jurisdiction."

Treinies v. Sunshine Mining Company, 99 Fed. (2d) 651, at 653.

The jurisdictional requirements were also set forth as follows:

"The bill of complaint is founded upon the Interpleader Act and seeks the remedy which it affords.

"Sec. 24 (26) confers jurisdiction on the district courts in suits of interpleader or in the nature of interpleader, by plaintiffs who are under an obligation to the amount of \$500.00 or more, the benefits of which are demanded by two or more adverse claimants who are citizens of different states. By subsection 26 (a) 'Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.' And by subsection 26 (a) (ii) and (d) complainant, upon satisfy-

ing jurisdictional requirements of the Act, and depositing the money or property in the registry of the court, or upon giving a prescribed bond, is entitled to a decree discharging him from further liability and enjoining the claimants from further proceedings in other courts to recover the sum claimed."

Worcester County Trust Company vs. Riley, 302 U. S. 292 at 294; 58 S. Ct. 185; 82 L. Ed. 268.

To the same effect are:

Sanders v. Armour Fertilizing Co., 292 U. S. 190; 54 S. Ct. 677; 78 L. Ed. 1206;

Cramer v. Phoenix Mutual Life Insurance Company (C. C. A. 8), 91 Fed. Rep. (2d) 141; Writ of certiorari denied, 302 U. S. 739; 58 S. Ct. 141; 82 L. Ed. 571; Petition for rehearing denied, 302 U. S. 778; 58 S. Ct. 263; 82 L. Ed. 602;

Ross v. International Life Insurance Company (C. C. A. 6) 24 Fed. (2d) 345;

Dugas v. American Surety Company, 300 U. S. 414, 57 S. Ct. 515, 81 L. Ed. 720;

Fidelity & Deposit Company of Maryland v. A. S. Reid & Co. (D. C. Pa.) 16 Fed. (2d) 502;

John Hancock Mutual Life Inc. v. Kegan, 22 Fed. Sup. 326;

Mallors v. Equitable Life Insurance Co. (C. C. A. 7), 87 Fed. (2d) 233; Cert. denied, 57 S. Ct. 786, 301 U. S. 685, 81 L. Ed. 1343;

Metropolitan Life Insurance Co. v. Segaritis (D. C. Pa.) 20 Fed. Sup. 739;

Dee v. Kansas City Life Insurance Co. (C. C. A. 7) 86 Fed. (2d) 813;

Klaber v. Maryland Casualty Company (C. C. A. 8), 69

- Fed. (2d) 934, 106 A.L.R. 617, note at 626;
United Life & Accident Insurance Co. v. Reynolds (C. C. A. 2), 62 Fed. (2d) 776;
Penn Mutual Life Insurance Co. v. Meguire (D. C. Ky.), 13 Fed. Sup. 967;
Eagel, Star & British Dominions v. Tadlock (D. C. Cal. 1936), 14 Fed. Sup. 933;
Vogel v. New York Life Insurance Company (C. C. A. 5), 55 Fed. (2d) 205; Cert. denied, 53 S. Ct. 9, 287 U. S. 604, 77 L. Ed. 525;
Thomas Kay Woolen Mill Co. v. Sprague (D. C. Ore.), 259 Fed. 338;
Rule 22 Federal Rules of Civil Procedure.

It is the contention of respondent, Sunshine Mining Company, that the case of *Sanders v. Armour Fertilizing Works*, *supra*, conclusively establishes the jurisdiction of the District Court to determine the ownership of the stock between Katherine Mason and Evelyn H. Treinies, and her predecessor in interest. While it is true the case of *Sanders v. Armour Fertilizing Works*, *supra*, arose under the Interpleader Act of 1926, the case is nevertheless directly in point, inasmuch as the 1936 Act is substantially the same as the 1926 Act except that the scope of the 1936 Act was enlarged. The court, in discussing the 1926 Act in the *Sanders* case, 292 U. S., at page 199, said:

"The general purpose and effect of the Act of May 8, 1926, were also well stated below—

"Suits for interpleader in which actions in other courts are enjoined were familiar to equity when the Constitution was adopted (see *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614) and are one of the forms of controversy to which, when arising between citizens of different States, the Federal judicial power was extended. The Act enlarges the processes of the District Court to cover a broad territory, but otherwise authorizes only an ordinary form of equitable relief. . . . The District Court of course is bound on an interpleader to give full faith and credit to the garnishment proceedings in Illinois. . . .

"We do not think the filing of the Federal interpleader and the payment thereunder of the money into the District Court in Texas operated to bring it under the dominion of Texas law. The applicant for interpleader often has a choice of forum, and he cannot at his will subject the rights of the contesting claimants to one set of laws rather than another. The purpose of the interpleader statute was to give the stakeholder protection, but in no wise to change the rights of the claimants by its operation. The interpleader is a suit in equity, and equitable principles and procedure are the same throughout the Federal jurisdiction. The court is to weigh the right or title of each claimant under the law of the State in which it arose, and determine which according to equity is the better. The decision should be the same whether the interpleader is filed in Illinois or in Texas. No one's rights are intended to be altered by paying the fund into the court, which as an impartial neutral is to determine them.'"

There cannot be any question but that the District Court of the United States, for the District of Idaho, Northern Division, did have jurisdiction of the parties and the subject matter and, having jurisdiction, it had the power

to determine the controversy existing between the claimants to the stock.

IDAHO STATE COURT JUDGMENT MUST BE GIVEN FULL FAITH AND CREDIT

Suit was instituted in the State District Court of Idaho by Katherine Mason and her husband against John Pelkes, Evelyn H. Treinies, and Sunshine Mining Company on the 4th day of August, 1934. (R. 126). At the time this suit was instituted the Sunshine Mining Company was subject to the jurisdiction of the Idaho state court by reason of the fact that all of its mining property was located within the jurisdiction of that court, and it has complied with the law of the state of Idaho with reference to foreign corporations doing business therein. Evelyn H. Treinies and John Pelkes, however, were not subject to the jurisdiction of the Idaho state court because they were not residents of the state of Idaho and service was not had upon them within the jurisdiction of the court. Nevertheless, both Pelkes and Evelyn H. Treinies appeared generally in that case. (R. 129 and 139). The Idaho state court, therefore, had jurisdiction of the parties and of the subject matter involved in that action.

However, before that case was tried, certain proceedings were had in the Superior Court of the State of Washington, in and for Spokane County, in the matter of the estate of Amelia Pelkes, deceased. These proceedings were

between Katherine Mason on the one side and John Pelkes on the other. Evelyn H. Treinies was not a party to any of these proceedings in the estate matter and neither was the Sunshine Mining Company. As a result of these proceedings between Katherine Mason and John Pelkes in the Superior Court of the State of Washington, an order was entered entitled "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor". (R. 282). This is the purported judgment on which the petitioner herein, Evelyn H. Treinies, now relies to establish her ownership to the stock in question.

For the purpose of this part of the argument, the respondent, Sunshine Mining Company, will admit the validity and the legality of the order entered in the Amelia Pelkes Estate proceedings, and will admit further, for the purpose of argument, that said judgment or order established the ownership of the stock in Evelyn H. Treinies' assignor namely, John Pelkes. As stated before, the Sunshine Mining Company was not in any way a party to any of these proceedings which culminated in the entry of the order of May 31, 1935, (R. 282), but, admitting the validity of said order as a judgment, it could do nothing more than establish that John Pelkes at a previous time was the owner of 30,598 shares of stock in the Sunshine Mining Company because at the time the order was entered, May 31,

1935, Pelkes did not own a share of stock in the Sunshine Mining Company. This judgment the Sunshine Mining Company has recognized. John Pelkes, as the record shows, had disposed of all of his stock in the Sunshine Mining Company. No one questions but what all of this block of 30,593 shares of stock was transferred on the records of the Sunshine Mining Company in accordance with the instructions of John Pelkes. In other words, the Sunshine Mining Company did treat John Pelkes as the absolute owner of 30,598 shares of its stock and recognized his right to transfer it on the books of the corporation and did transfer it in accordance with his instructions. Of this block of stock Evelyn H. Treinies received 16,000 shares, which is the subject matter of this controversy.

At this point, therefore, neither John Pelkes nor Evelyn H. Treinies could in any way question the action of the Sunshine Mining Company because the company recognized Pelkes first as the owner of 30,593 shares of its stock and permitted it all to be transferred on the books of the company in accordance with his instructions. Subsequently and from the 13th day of November, 1933, (R. 157), being the date on which Pelkes transferred 16,000 shares to Evelyn H. Treinies, the company recognized Evelyn H. Treinies as the owner of this stock transferred to her by John Pelkes, and, further, the Sunshine Mining Company paid to her the dividends accruing on her stock.

After May 31, 1935, the date on which the findings and order approving partition, correcting receipts for distributive shares and discharging executor (R. 282) was entered in the Superior Court of the State of Washington, John Pelkes amended his answer in the case of *Mason v. Pelkes et al* in the state district court of Idaho and, among other things, set up the order of May 31, 1935, as a defense. Following his amendment, the case was tried, all parties appearing generally. Following the trial, judgment and decree was entered, wherein Katherine Mason was adjudged to be the owner of 7649 shares of said stock and Evelyn H. Treinies 3351 shares, and the Sunshine Mining Company was ordered to recognize the ownership of said respective parties. (R. 165).

From this judgment and decree all parties appealed to the Supreme Court of the state of Idaho, and the Supreme Court of the state of Idaho modified the judgment of the trial court and decreed Katherine Mason to be the owner of 15,299 shares. (R. 167). Subsequently John Pelkes and Evelyn H. Treinies petitioned for writ of certiorari to the Supreme Court of the United States, which petition was denied. (57 S. Ct. 319, 299 U. S. 615, 81 L. Ed. 453). The judgment of the Supreme Court of Idaho, therefore, became a final judgment adjudicating the rights of all the parties, namely, Katherine Mason was adjudged to be the owner of 15,299 shares of stock and the dividends accrued

and accruing thereon, and the Sunshine Mining Company was ordered to recognize her rights of ownership. Whatever may be the rights between Evelyn H. Treinies and Katherine Mason, the fact remains that the judgment of the Idaho Supreme Court is a judgment finally determining the rights of the parties so far as the Sunshine Mining Company is concerned, and the Sunshine Mining Company was bound to recognize the decree of the Idaho court and that judgment must be accorded full faith and credit in the state of Washington.

On this question the Supreme Court of the United States, in the case of *Roche vs. McDonald*, 275 U. S. 449, 72 L. Ed. 365, at page 368, said:

"It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state. *Mills v. Duryee*, 7 Cranch, 481, 484, 3 L. Ed. 411, 413; *Hampton v. M'Connel*, 3 Wheat. 234, 235, 4 L. Ed. 378, 379; *D'Arcy v. Ketchum*, 11 How. 165, 175, 13 L. Ed. 648, 652; *Cheever v. Wilson*, 9 Wall. 108, 123, 19 L. Ed. 604, 608; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 643, 44 L. Ed. 619, 621, 20 Sup. Ct. Rep. 506; *Tilt v. Kelsey*, 207 U. S. 43, 57, 52 L. Ed. 95, 101, 28 Sup. Ct. Rep. 1; *Converse v. Hamilton*, 224 U. S. 243, 259, 56 L. Ed. 749, 755, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D,

1292. This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, must be enforced in such other state, although repugnant to its own statutes. *Christmas v. Russell*, 5 Wall. 290, 302, 18 L. Ed. 475, 478; *Fauntleroy v. Lum*, 210 U. S. 231, 236, 52 L. Ed. 1039, 1041, 28 Sup. Ct. Rep. 641; *Kenney v. Supreme Lodge*, L. O. M. 252 U. S. 411, 415, 64 L. Ed. 638, 640, 10 A.L.R. 716, 40 Sup. Ct. Rep. 371."

And again the court said on page 369:

"* * * The court of Oregon has jurisdiction of the parties and of the subject-matter of the suit. Its judgment was valid and conclusive in that state. The objection made to enforcement of that judgment in Washington is, in substance, that it must there be denied validity because it contravenes the Washington statute and would have been void if rendered in a court of Washington; that is, in effect, that it was based upon an error of law. It cannot be impeached upon that ground. If McDonald desired to rely upon the Washington statute as a protection from any judgment that would extend the force of the Washington judgment beyond six years from its rendition, he should have set up that statute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive between the parties in that state, was equally conclusive in the courts of Washington, and under the full faith and credit clause should have been enforced by them."

We submit that the case of *Roche vs. McDonald* is decisive on this point and, regardless of the interpleader action, the

Idaho judgment so far as the Sunshine Mining Company is concerned is binding upon all of the parties and is entitled to full faith and credit under Article IV Section 1 of the Constitution of the United States.

BILL OF INTERPLEADER NOT AGAINST STATE OF WASHINGTON

The petitioner in her brief contends that the bill of interpleader is in fact a suit by a citizen of one state in the Federal District Court against another state, and contends that the District Court did not have jurisdiction because the action was contrary to the Eleventh Amendment of the Federal Constitution. In support of this contention, petitioner relies upon the case of *Worcester County Trust Co. v. Riley*, 58 S. Ct. 185, 302 U. S. 292.

In the *Worcester County Trust Co. v. Riley* case, *supra*, the executor of a last will and testament of a decedent which had been probated in Massachusetts sought, through a bill of interpleader, to implead the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts and officers of the state of California, all charged with the duty of administering death tax statutes in their respective states, and the court held that a bill of interpleader would not lie in such a case because the suit was in effect an action by a citizen of one state against another state, which action the Eleventh Amendment of the Constitution for-

bids. The court in the *Worcester County Trust Co.* case, *supra*, 302 U. S., at 299 said:

"Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States. Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids. *We do not pass on the construction of the Interpleader Act or its applicability in other respects.*" (Italics ours)

From the foregoing, it is clear that the court denied relief simply because such a proceeding was not permitted under the Eleventh Amendment. The court expressly did not pass upon the construction of the Interpleader Act or its applicability in any other respect.

Apparently counsel for the petitioner reasoned that the State of Washington was in fact a party to this litigation by reason of the fact that A. W. Hawkins, Judge of the Superior Court of the State of Washington in and for Yakima County, Pelkes Administrator, and J. C. Cheney, as Receiver, were made parties defendant. Examination of the pleadings in the interpleader action will disclose that Judge Hawkins, while named a party, was not at any time in any way enjoined from proceeding with the case, and will further show that Judge Hawkins, by his answer and return to the

show cause order, did not question the jurisdiction of the Federal District Court but simply expressed a willingness to await the decision and disposition of the case as determined by the Federal District Court. (R. 14, 15). Further, he has not at any time appealed or complained in any way against any of the rulings made or judgments entered in the interpleader action. So far as J. C. Cheney, as Receiver, is concerned, he has not at any time complained or questioned the jurisdiction of the Federal District Court and in fact appeared in the interpleader action in the same manner as Judge Hawkins, and the receiver adopted as his answer the answer of Judge Hawkins. (R. 46). It is true that J. C. Cheney, as Receiver, did join in the appeal with Evelyn H. Treinies to the Circuit Court of Appeals, but he has not joined with her in her application for writ of certiorari, and is not now before this court complaining in any respect against the judgment or decrees entered herein. While J. C. Cheney, as Receiver, was enjoined by the temporary restraining order from taking any proceedings pending the determination of the interpleader action, yet, when the judgment and decree of the Federal District Court was entered he was not in any way enjoined or restrained (R. 323). In fact, he was not even mentioned in the judgment and decree of the Federal District Court. (R. 321).

It is well settled that the court will not hear any complaints or review any proceedings, even though errone-

eous, where a party has not appealed and is not before the court on appeal.

Lloyd et al v. Elting, 287 U. S. 329, 53 S. Ct. 77 L. Ed. 341;

Federal Trade Commission v. Pacific States Paper Assn., 47 S. Ct. 255, 273 U. S. 52, 71 L. Ed. 534;

Marine Transport Corp. v. Dreyfus, 52 S. Ct. 166, 284 U. S. 263, 76 L. Ed. 282;

Southern Pacific R. Co., v. United States, 18 S. Ct. 18, 168 U. S. 1, 42 L. Ed. 355.

The petitioner herein also contends that the Federal Court under the interpleader act was not empowered and could not interfere with the jurisdiction of the state courts. Or stated in another way, the petitioner contends that the Federal Courts are not authorized under the interpleader act to set themselves up as a court of review to reverse or void judgments of a state court, as being attempted in this case. The Interpleader Act, Title 28, U. S. C. A., Section 41, Subdivision 26, (c) provides:

"Notwithstanding any provision of Part I of this title to the contrary, said court shall have power to issue its processes for all such claimants and to issue order of injunction against each of them enjoining them from instituting or prosecuting any suit or proceedings in any state court . . . on account of such money or property or other instrument or obligation until further order of the court. . . ."

In the case at bar the United States District Court did not interfere with the jurisdiction of the state court of Idaho nor the state court of Washington, neither did it set itself up as a tribunal to review, modify, reverse, or cancel judgments of the state court. Said court simply issued its process to the claimants and enjoined one group of claimants from instituting or prosecuting any further suit or proceedings in the state court with reference to the stock in question. As was said in the Supreme Court case of *Sanders v. Armour Fertilizing Works*, 292 U. S. 190, at page 199:

"Suits for interpleader in which actions in other courts are enjoined were familiar to equity when the Constitution was adopted (see *Spring v. South Carolina Ins. Co.* 8 Wheat. 268, 5 L. Ed. 614) and are one of the forms of controversy to which, when arising between citizens of different States, the Federal judicial power was extended. The Act enlarges the processes of the district Court to cover a broader territory, but otherwise authorizes only an ordinary form of equitable relief. . . ."

The United States District Court in this case therefore did have the jurisdiction and the authority under the Interpleader Act to enjoin one group from proceeding with litigation and the District Court in no way set itself up as a court of review for the State Court, nor was it in any way attempting to interfere with the jurisdiction of the State Court.

Admitting however, for the purpose of argument that A. W. Hawkins as Judge and J. C. Cheney as Receiver, were improperly made parties defendant in the interpleader ac-

tion, and admitting for the purpose of argument that joining of said parties as defendants was tantamount to making the State of Washington a party defendant, and admitting further that said parties had properly appealed and were before the Supreme Court complaining of the rulings made against them, the action as to them could only be dismissed. Such, however, would not affect the interpleader action insofar as real parties claimant in interest are concerned; namely, Katherine Mason and her husband on one side, and Evelyn H. Treinies on the other. Unquestionably these real parties in interest were properly before the court, and the District Court had jurisdiction to enjoin Evelyn H. Treinies and her assignor, John Pelkes' Administrator, from proceeding with their litigation in the State Court of Washington.

**IDAHO STATE COURT JUDGMENT AND DECREE IS
RES JUDICATA AND PARTIES ARE ESTOPPED
FROM QUESTIONING VALIDITY**

The suit of Katherine Mason and her husband against John Pelkes and Evelyn H. Treinies and Sunshine Mining Company in the Idaho State Court was an action by Katherine Mason to enforce an oral trust against stock in the hands of Evelyn H. Treinies, and the action was, therefore, cognizable by a court of general jurisdiction. That jurisdiction was vested in the Idaho State District Court. All parties appeared generally in said case, and the court, therefore, had

jurisdiction of both the parties and the subject matter. Concerning this question, the District Court below said:

What then was the nature of the action in the Idaho Court? It was simply one to enforce an oral trust growing out of the division of personal property that had been derived from a decree of distribution after it has been completely distributed and therefore the cause of action was cognizable by a court of general equitable jurisdiction. That jurisdiction was vested in the Idaho Court. Pelkes and Treinies appeared in the Idaho Court which gave it jurisdiction over both parties and the subject matter. That jurisdiction attached before Mrs. Mason's petition was filed in December, 1934, in the Superior Court of Washington. The Idaho Court then acquired jurisdiction first of the parties and the controversy over the ownership of the 15,299 shares of stock, and the decision of the highest Court of that state which was not disturbed by the Supreme Court of the United States when in denying Pelkes' and Treinies' application for writ of certiorari, is final and conclusive upon the Federal Courts. While a denial of a petition for a writ of certiorari in a particular case does not constitute a precedent for any other case, yet it is an affirmance of the judgment in the particular case sought to be reversed. When as disclosed by the present record, which includes the record in the Idaho case, where the enforcement of a trust growing out of a division of the shares of stock involved, and the Supreme Court of Idaho having concluded, when in considering the issue of fact relative to the controversy of ownership of the shares of stock between the parties, to be owned by Katherine Mason, its decision upon that issue of fact is conclusive upon which it is based, and final and conclusive upon the parties in all future litigation between them, when as said, it had jurisdiction first to determine that issue. The scope of the issue as to the existence of an oral trust now presented, involved in the Idaho case an adjudication of that issue. A reading

of its opinion leaves no doubt that the ownership in the 15,299 shares of stock was awarded to Katherine Mason." *Sunshine Mining Co. v. Treinies*, 19 F. Supp. 587 at 593.

Since the Sunshine Mining Company was made a party to the case in the Idaho State Court and since John Pelkes presented to that court for decision the order entered in the estate proceedings in the Superior Court of the State of Washington and since all questions in regard to that order and the rights of various parties were fully and completely litigated in that action, the judgment entered in the Idaho State District Court is *res judicata*.

"The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. *In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.* Thus, for example; a judgment rendered upon a promisory note is conclusive as to the validity of the instrument and the amount due upon it,

although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." (Italics ours).

Cromwell v. County of Sac. 94 U. S. 351, 24 L. Ed. 195.

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all

matters properly put in issue and actually determined by them.

"Among the cases in this court that illustrate the general rule are *Hopkins v. Lee*, 19 U. S. 6, Wheat. 109, 113 (5:218, 219); *Smith v. Kernochen*, 48 U. S. 7 How. 198, 216 (12:666, 673); *Thompson v. Roberts*, 65 U. S. 24 How. 233, 240 (16:648, 650); *Washington, Alexandria, & Georgetown S. P. Co. v. Sickles*, 65 U. S. 24 How. 333, 340, 341, 343 (16:650, 652, 653); *Russell v. Place*, 94 U. S. 606, 608 (24:214, 215); *Cromwell v. Sac. County*, 94 U. S. 351 (24:195); *Campbell v. Rankin*, 99 U. S. 261 (25:435); *Mason Lumber Co. v. Buchtel*, 101 U. S. 638 (25:1072); *Bissell v. Spring Valley Township*, 124 U. S. 225, 230 (31:411, 413); and *Johnson Co. v. Wharton*, 152 U. S. 253 (38:430)." (The court then proceeds to review the above authorities on this point.)

Southern Pacific R. Co. v. United States, 18 S. Ct. 18, 168 U. S. 1, 42 L. d. 355.

The real claimants and parties in interest having fully and completely litigated the issues as to the ownership of the stock in the Idaho State Court, and John Pelkes having presented the order entered in the Probate Court of the State of Washington to the Idaho Court for decision, and that court having entered its judgment and decree finally determining the issues, the case is *res judicata*, and Evelyn H. Treinies and her assignor, John Pelkes, are estopped and precluded from re-litigating the same issues in the state of Washington as attempted in their amended complaint in the Superior Court of the State of Washington. (R. 244, 256).

VI

CONCLUSION

1. The district Court of the United States for the district of Idaho, Northern Division, has jurisdiction under Title 28 U. S. C. A., Sec. 41, Subdivision 26, entitled "Original Jurisdiction of Bills of Interpleader and of Bills of the Nature of Interpleader" enacted on the 20th day of January, 1936, Chap. 13, Sec. 1, 49 Statutes at Large, 1096, to hear and determine the rights of the adverse claimants to the stock here in question.

2. The judgment entered in the State District Court of Idaho, pursuant to the decision of the Supreme Court of Idaho, all parties having appealed, which decision the Supreme Court of the United States refused to review on writ of certiorari, is entitled to full faith and credit in the state of Washington, and must be given full faith and credit by the courts of the state of Washington in any suit against the Sunshine Mining Company.

3. The Eleventh Amendment of the Constitution of the United States did not forbid the bill of interpleader in this case because the suit is not by a citizen of one state against another state, but is a suit directly under the Interpleader Act of 1936 against two adverse claimants, citizens of different states, compelling them to interplead and have their rights adjudicated.

4. The judgment and decree of the Idaho State District Court entered pursuant to the decision of the Supreme Court of Idaho is res judicata and binding upon all of the parties hereto, and they are estopped to re-litigate the same issues in the State of Washington.

Respondent, Sunshine Mining Company, respectfully submits that the opinion of the Circuit Court of Appeals, Ninth Circuit, should be affirmed.

Respectfully submitted,

NAT U. BROWN

C. W. HALVERSON

Attorneys for Respondent,
Sunshine Mining Company.



OFFICE OF THE

SECRETARY OF THE
TREASURY

THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.

TO THE HONORABLE
MEMBERS OF THE HOUSE OF REPRESENTATIVES
AND SENATORS OF THE UNITED STATES
AND TO THE MEMBERS OF THE
GENERAL ASSEMBLY OF THE DISTRICT OF COLUMBIA

IN RESPONSE TO A RESOLUTION PASSED BY THE HOUSE OF REPRESENTATIVES
ON APRIL 10, 1896, AND BY THE SENATE ON APRIL 11, 1896

REPORT OF THE
COMMISSIONERS OF THE GENERAL LAND OFFICE

FOR THE YEAR ENDING
JUNE 30, 1896

PREPARED BY
THE COMMISSIONERS OF THE GENERAL LAND OFFICE
AND
THE SECRETARY OF THE TREASURY

PRINTED BY THE
GOVERNMENT PRINTING OFFICE
WASHINGTON, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 4

EVELYN TREINIES,

Petitioner,

vs.

SUNSHINE MINING COMPANY, KATHERINE
MASON, T. R. MASON, LESTER S. HARRISON,
GRACE G. HARRISON, WALTER H. HANSON,
EDNA B. HANSON AND F. C. KEANE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENTS

Katherine Mason, T. R. Mason, Lester S. Harrison,
Grace G. Harrison, Walter H. Hanson, Edna B. Han-
son and F. C. Keane.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 99 Federal Reporter (2nd series) 651. (R. 347.) The opinion of the District Court of the United States for the District of Idaho is reported in 19 Federal Supplement 587. (R. 324.) The opinion of the Supreme Court of Idaho is reported in 59 Pacific Reporter (2nd series) 1087. (R. 167.) Petition for Certiorari denied by this Court January 11, 1937, 299 U. S. 615.

JURISDICTION.

Petitioner seeks to have this Court review a decree that has already been before this Court on petition for certiorari, denied January 11, 1937, (299 U. S. 615), the only difference being, so far as these respondents are concerned, that the said petition in the former action sought to invoke the jurisdiction of this Court under Judicial Code, Sec. 237 (b), as amended, (United States Code Annotated, Title 28, Sec. 344 [b]), (Petition of John Pelkes and Evelyn H. Treinies, October Term, 1936, No. 379, page 14), while in the pending action, petitioner, Evelyn Treinies, seeks to invoke the jurisdiction of this Court under Section 240 (a) of Judicial Code as amended, (United States Code Annotated, Title 28, Sec. 347 [a]). (Petitioner's brief, October Term, 1939, No. 4, page 2). *The self same questions were presented in the Petition of John Pelkes and Evelyn H. Treinies in 1936 as are now presented, with the exception of the right of the respondent, Sunshine Mining Company, to avail itself of the protection afforded a stakeholder under the Federal Interpleader Act, Judicial Code 24(26) as amended (United States Code Annotated, Title 28, Sec. 41, Sub-division 26).*

STATEMENT OF THE CASE.

Amelia Pelkes died in 1922. Her surviving spouse, John Pelkes, who was the petitioner's assignor of the stock in litigation, and Katherine Mason, only child by a former marriage, survived her. Her will was admitted to probate in the Superior Court of Spokane County, State of Washington. By the terms of that will one-half of her estate was bequeathed and devised to Mr. Pelkes, the other half to Mrs. Mason. Her entire estate consisted of community property belonging to the marital community composed of herself and her

said husband. In accordance with said will, therefore, three-fourths of the entire community estate would become the property of Mr. Pelkes, one-fourth the property of Mrs. Mason. Both Mr. Pelkes and Mrs. Mason understood and agreed that such will did *not* express the intention of the decedent, that it was the intention that Mr. Pelkes and Mrs. Mason divide equally the entire community estate. (R. 174 and 175.)

On August 9, 1923, final decree of distribution was entered in said court in said estate of Amelia Pelkes, deceased. Said decree distributed said estate in accordance with the terms of said will. Among the assets of said community estate were 30,598 shares of stock of the Sunshine Mining Company and shares of stocks of other mining companies, none of which were inventoried in said estate and none of which had any market value at that time. Said decree contained an omnibus clause distributing all property "now remaining in the hands of said executor and any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest * * *." (R. 176.)

Shortly after the death of his wife, Mr. Pelkes moved to the home of the Masons at Kellogg, Idaho, where he resided for several years thereafter. After the entry of said decree of distribution Mr. Pelkes and Mrs. Mason at Kellogg, Idaho, divided equally between them in accordance with Mrs. Pelkes' intention and their agreement the property they then owned in common received from said estate, Mr. Pelkes holding the one-half interest in the certificate for 30,598 shares of Sunshine Mining Company stock and in the other mining companies stock certificates in trust for Mrs. Mason. (R. 177 and 178.)

In accordance with such agreement, Mr. Pelkes and Mrs. Mason each became the owner of 15,299 shares of

said Sunshine stock. Between the time of the entry of said final decree of distribution on August 9, 1923, and November 8, 1933, Mr. Pelkes sold, disposed of and transferred 14,598 shares of the 15,299 shares of said stock so owned by him. There thus remained but 16,000 shares of said stock, 15,299 shares of which Mr. Pelkes held in trust for Mrs. Mason. The wrongful disposition then attempted by Mr. Pelkes of said 16,000 shares of said stock to the petitioner herein, Mrs. Evelyn Treinies, is thus described by the Supreme Court of Idaho:

“Early in 1931, Pelkes and Mrs. Mason met, in California, appellant Evelyn H. Treinies, a niece of his deceased wife and a cousin of Mrs. Mason. She was at that time about 40 years of age, and he had not seen her since she was a child. During the time the three were together appellant, Treinies, showed great affection for Pelkes, kissed him frequently and made a proposal of marriage to him. She continued her attentions to him until the time of the trial, and took care of him during some of his attacks of illness. November 8, 1933, appellants Pelkes and Treinies, entered into a contract wherein it was agreed he should assign to her 16,000 shares (then market value \$3.00 per share) of the capital stock of Sunshine Mining Company (and other income producing property) and, in consideration thereof, she should support, maintain and care for him to the best of her ability during the remainder of his life.” (Mr. Pelkes was then 81 years of age.) (R. 178 and 179.) (Words in parentheses ours.)

Following receipt of information in August, 1934, of such transfer of said stock to Mrs. Treinies suit in the State District Court of Idaho was instituted by Mr. and Mrs. Mason to enforce said trust as against said 16,000 shares as to the 15,299 shares thereof belonging to Mrs. Mason. (R. 179.) To such suit Mr. Pelkes and Mrs. Treinies each entered a *general*

appearance and separately filed answers thereto. The Sunshine Mining Company was made a party to said suit and was forthwith upon the commencement of the same enjoined from transferring the stock in question or paying over the dividends accruing thereon until the further order of that Court. (R. 168.)

Thereafter on May 31, 1935, the Superior Court of Spokane County, State of Washington, upon petition of Mr. Pelkes, entered in said probate proceedings of Amelia Pelkes, deceased, its "Findings and Order Approving Partition, Correcting Receipts for Distributive Shares and Discharging Executor," referred to herein by petitioner as the Washington judgment. Such "Findings and Order" was procured by Mr. Pelkes in violation of a restraining order directed to Mr. Pelkes and Mrs. Mason issued by the State District Court of Idaho in the said trust suit pending therein. (R. 182, 183 and 184.)

Immediately after procuring said "Findings and Order" of May 31, 1935, Mr. Pelkes amended his answer theretofore filed in the pending Idaho State District Court suit and pleaded said "Findings and Order" of the Superior Court of Spokane County, Washington, as a bar to said suit. (R. 182 and 183.)

The Idaho State District Court held such "Findings and Order" as not *res judicata* and on the merits determined the suit partially favorable to the Masons. From such determination of the suit Mr. Pelkes and Mrs. Treinies appealed and the Masons cross-appealed to the Supreme Court of Idaho. The Supreme Court of Idaho held such "Findings and Order" not *res judicata* of such Idaho trust suit and on the merits, on the Masons' cross-appeal, decided wholly favorable to the Masons, awarding them the 15,299 shares of Sunshine stock. (R. 184-192.)

Thereupon Mr. Pelkes and Mrs. Treinies petitioned this Court to grant a writ of certiorari to review the decision of the Supreme Court of Idaho *upon the ground that the Supreme Court of Idaho had failed to give to the alleged judgment ("Findings and Order") of the Superior Court of Spokane County, State of Washington, the faith and credit to which it was entitled under Art. IV, Sec. 1 of the Constitution of the United States.* The petition for certiorari was denied by this Court. *John Pelkes and Evelyn H. Treinies, petitioners, v. Katherine Mason and T. R. Mason*, 299 U. S. 615.

On August 12, 1936, Mr. Pelkes and Mrs. Treinies instituted a suit in the Superior Court of Spokane County, Washington, against the Masons, their attorneys and the Sunshine Mining Company, wherein plaintiffs alleged they were the owners of all of said 16,000 shares of Sunshine stock; that the Idaho State Courts had no jurisdiction over them and that they were not bound by said decree of the Idaho State Courts; and prayed that their title to said stock be quieted and the Sunshine Mining Company be compelled to recognize Mrs. Treinies' ownership thereof.

On January 11, 1937, this Court, as heretofore stated, denied the application for a writ of certiorari. On the same day, an order was made by a Judge of the Superior Court of Spokane County, Washington, without notice to any of the defendants named in the Washington case, appointing J. C. Cheney as temporary receiver to take into his possession as such the "undivided interest in the assets of Sunshine Mining Company evidenced by the certificate of stock" originally (November, 1933) issued to Mrs. Treinies and theretofore cancelled on its books by the Sunshine Mining Company in compliance with the decree of the Idaho State Court. Cheney in any capacity never held

any stock certificates, either that stock certificate of Mrs. Treinies which she deposited in the registry of the United States District Court herein or any other stock certificates owned or claimed by any party to any of the litigation. No certificates of stock were ever tendered unto, held by or impounded by any court of the State of Washington or any officer thereof. (R. 312.)

An amended complaint was filed in said Washington suit. The substance of the complaint was that the Idaho State Courts had failed to give full faith and credit to the alleged judgment ("Findings and Order") of the Superior Court of Spokane County, Washington, as required by the provisions of Sec. 1, Art. IV of the Constitution of the United States (the same question which was presented in the Supreme Court of Idaho and in the petition for certiorari to this Court). (R. 258.)

The cause was transferred to the Superior Court of Yakima County, Washington, wherein it was pending upon demurrers to said amended complaint and motions to quash the order appointing Cheney receiver made by the Sunshine Mining Company when this interpleader suit was instituted in the United States District Court for Idaho by the Sunshine Mining Company. (R. 313.)

The adverse claims having been made to the stock and dividends, Sunshine Mining Company instituted the pending interpleader suit.

Upon the institution of this interpleader suit the Sunshine Mining Company deposited in the registry of the District Court cash dividends which it held on the 16,000 shares in controversy, such cash so then deposited being \$19,123.75. Just prior to entry of decree it deposited an additional \$11,473.25, being cash

dividends accumulated subsequent to the institution of the interpleader suit. (R. 313 and 314.) On May 15, 1937, on motion of Sunshine Mining Company, the District Court entered its order requiring Mrs. Treinies to deposit in the registry of the Court the certificate for 16,000 shares which stood in her name; said order also required the Masons to deposit in the registry of the court the certificates which stood in their names totaling 15,299 shares and \$42,225.24 cash received by them from dividends paid thereon; said order also required the Sunshine Mining Company to deposit in the registry of the Court as declared during the pendency of such suit in said Court any further cash dividends. (R. 120-122.)

All of the parties fully complied with said order. Thus before the District Court attempted to determine the issues, the entire subject-matter of this litigation was in the registry of the United States District Court.

While in the pending interpleader suit A. W. Hawkins, Judge of the Superior Court of Yakima County, Washington, and J. C. Cheney, as receiver appointed by such Superior Court, were made parties to the same, no judgment or injunction of any kind or nature was granted by the decree of the United States District Court herein against either said Judge or said receiver. (R. 321-324.)

SUMMARY OF THE ARGUMENT.

I. That the United States District Court had jurisdiction of this interpleader suit.

(1). There is no question but that there were present the necessary diversity of citizenship and amount in controversy to give jurisdiction.

(2). There is no question but that there were present the necessary two or more adverse claimants claiming to be entitled to the property and money in controversy.

(3). The complainant deposited and caused to be deposited the money and property into the registry of that Court there to abide the judgment of that Court.

(4). There was in the registry of that Court the entire subject matter of the litigation and in that Court all the parties claimant before that Court attempted to determine the controversy.

(5). This suit is not an action against a State.

(6). *Asher v. Bone*, 100 Fed. (2d) 315, cited by petitioner, is not authority for petitioner's contention of lack of jurisdiction of the Federal Courts in the present cause.

II. That the judgment entered by direction of the Supreme Court of Idaho is *res judicata* and determinative of this controversy.

(1). The so-called judgment ("Findings and Order") entered by the Superior Court of Spokane County, State of Washington, on May 31, 1935, having been pleaded in bar of the Idaho State Court action, and the Idaho State Courts (District and Supreme) having determined that said Superior Court did not have jurisdiction to make or enter said "Findings and Order," the judgment of the Idaho State Courts thereon, certiorari denied by this Court, is final, conclusive and *res judicata* in so far as the validity of said so-called Washington judgment is concerned, that matter having been put directly in issue in the Idaho State Court suit and the Idaho State Courts hav-

ing had jurisdiction of all of the parties (including petitioner herein) necessary to a determination of the action and also jurisdiction of the cause, the foregoing is true even though the Idaho State Courts erred in determining the jurisdiction of the said Superior Court of Spokane County, State of Washington.

III. That, answering petitioner's argument, although the matter was properly determined as *res judicata*, had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

(1). That the Sunshine stock in question was distributed by the omnibus clause of the decree of distribution entered by said Spokane Superior Court on August 9, 1923.

(2). That the Sunshine stock in question was actually distributed in 1923 by the executor and two sole beneficiaries of the Will of Amelia Pelkes, deceased, the executor was one of said two beneficiaries, after entry of said decree of distribution, which distribution they had a right to make.

(3). That since distribution was made, whether it be viewed that it was made by said omnibus clause or simply actually by the executor and sole beneficiaries, the "Findings and Order" entered by said Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a differ-

ent distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes and Mrs. Mason therein founded upon the contract admittedly made by those two in Idaho after August 9, 1923.

(4). That the jurisdiction of the Spokane Superior Court sitting in probate to decide who was the owner of the stock in question was not sustained by the Supreme Court of Washington in this case, as the denial of a writ of prohibition without opinion by that Court is not "equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues. * * *"

(5). That the United States District Court, although holding that the judgment entered by direction of the Supreme Court of Idaho was *res judicata* of the pending controversy, made an examination of the decisions and statutes of the State of Washington and came to the conclusion that the Spokane Superior Court sitting in probate, had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry of the decree of distribution by said Superior Court.

ARGUMENT.

As indicated in the foregoing Summary these respondents will support the following three propositions which they believe completely determine the cause in their favor:

- I. That the United States District Court had jurisdiction of this interpleader suit.
- II. That the judgment entered by direction of the Supreme Court of Idaho is *res judicata* and determinative of this controversy.

III. That, answering petitioner's argument, although the matter was properly determined as *res judicata*, had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

We shall discuss such three propositions in the order stated.

I.

That the United States District Court had jurisdiction of this interpleader suit.

(1). There is no question but that there were present the necessary diversity of citizenship and amount in controversy to give jurisdiction.

(2). Nor is there any question but that there were present the necessary two or more adverse claimants claiming to be entitled to the property and money in controversy.

(3). Upon the institution of this interpleader suit respondent Sunshine Mining Company deposited in the registry of the District Court cash dividends which it held on the 16,000 shares in controversy, such cash so then deposited being \$19,123.75. During the pendency of this suit in the District Court said respondent deposited as declared further cash dividends. (R. 313 and 314.) In compliance with order entered by the District

Court upon motion of respondent Sunshine Mining Company on May 15, 1937, Mrs. Treinies, petitioner herein, deposited in the registry of the Court the certificate for 16,000 shares which she had theretofore always held since issuance and which stood in her name, and in compliance with said order the Masons likewise deposited certificates which stood in their names totaling 15,299 shares and \$42,225.24 cash received by them from dividends paid to them thereon. (R. 120-122.)

No cash, dividends or certificates of stock involved in this litigation were ever tendered into, held by or impounded by any Court of the State of Washington or any officer thereof. (R. 312.)

(4). Thus prior to the time the United States District Court attempted to determine the issues herein, the entire subject-matter of this litigation was in the registry of that Court, and all parties claiming any interest in such subject-matter were before that Court.

(5). This suit is not an action against a State.

It is true that in this interpleader suit A. W. Hawkins, former Judge of the Superior Court of Yakima County, Washington, and J. C. Cheney, as receiver appointed by such Superior Court, were made parties to the same. It is clear, however, from the record herein that the real parties in interest in this suit were solely on the one hand Mrs. Treinies, the petitioner herein, and the Masons on the other hand, they were the claimants on the respective sides of the stock certificates of the Sunshine Mining Company and cash dividends declared thereon which are the subject-matter of this litigation. Therefore, none of the other parties named as defendants in the bill of interpleader were necessary parties to the determination of this controversy.

The decree of the United States District Court herein, affirmed by the Circuit Court of Appeals, *grants no judgment or injunction of any kind or nature against either said Judge or said receiver.* (R. 321-324.) No party named in said bill of interpleader seeks in this Court relief from the judgments of the lower Courts except the petitioner, Mrs. Treinies.

It cannot, therefore, with any semblance of substance, be contended that there is now before this Court any judgment "to compel or restrain state action" or "nominally against individuals but restraining or otherwise affecting their action as State officers," so as to make the judgment herein violative of the Eleventh Amendment and come under the ban announced by Mr. Justice Stone in the case of *Worcester County Trust Company v. Riley*, 302 U. S. 292.

That said case last mentioned, although it is strongly relied upon by petitioner, has no application to the facts in this case. In that case the petitioner prayed

"That the Court order respondent officials of the two States to interplead their respective claims for the tax; * * *"

The right to tax is the most vital power possessed by a State. Its existence depends thereon. The tax officers in that case were clearly representing the States in question and were not representing private individuals or private rights.

The instant case is essentially a private litigation and no proprietary interest of the State of Washington has been interfered with. Neither the Attorney General of the State of Washington nor any other State officer is here registering any complaint. The petitioner herein is not authorized nor empowered to speak for the State of Washington.

“* * * The immunity from suit belonging to a State, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege * * *.”

Clark v. Barnard, 108 U. S. 436.

Gunter v. Atlantic Coast Line Railroad Co., 200 U. S. 273.

Immunity from suit, therefore, is a personal privilege which may be demanded by a sovereign. It is not a public right which may be insisted upon by a private individual. We submit that the State of Washington is not a party hereto and has no concern in this litigation.

(6). *Asher v. Bone*, 100 Fed. (2d) 315, cited by petitioner, is not authority for petitioner's contention of lack of jurisdiction of the Federal

Courts in the present cause.

Petitioner discusses said case in this regard on pages 28 and 29 of her brief, citing only the following statement of elementary probate law therefrom:

“The jurisdiction to determine the interest of respective claimants on an estate in Idaho is exclusively in the probate courts of that State having jurisdiction of the proceedings and the determination thereof by such probate court, whether right or wrong, is conclusive and subject only to be reversed, set aside or modified on appeal.”

After some discussion petitioner on page 29 of her brief concludes:

“By the same token, and on the authority of *Asher v. Bone*, supra, and other cases here cited, it (United States District Court) had no jurisdiction to reverse the Washington State Courts.” (Words in parenthesis ours.)

The United States District Court herein did not "reverse the Washington State Courts." It merely held that the so-called Washington judgment ("Findings and Order") having been pleaded as a defense in bar of the Idaho State court action and such plea of *res judicata* having been denied by the Idaho State Courts, that such judgment of the Idaho State Courts having become final the same was conclusive as between the parties thereto, which includes the petitioner herein, and could not be relitigated in the present interpleader suit.

To resume with the decision of *Asher v. Bone*, immediately following the portion of the opinion therein set forth on page 28 of petitioner's brief and above quoted herein is the following:

"A court of equity cannot invalidate or modify the probate court's decree of distribution. It can, however, declare that the fraudulent recipients of the property of the estate hold the proceeds in trust for those who have been defrauded by their extrinsic fraud."

Asher v. Bone, 100 Fed. (2d) 315, 317.

The Court concludes its opinion on page 319 of said citation with the following:

"We conclude that there was no showing of extrinsic fraud sufficient to justify this court in declaring a trust in the property of the estate in the hands of the distributees."

So this case of *Asher v. Bone* decides nothing pertinent to the inquiry here.

From the foregoing these respondents submit that the United States District Court had jurisdiction of this interpleader suit.

II.

That the judgment entered by direction of the Supreme Court of Idaho is *res judicata* and determinative of this controversy.

(1). The so-called judgment ("Findings and Order") entered by the Superior Court of Spokane County, State of Washington, on May 31, 1935, having been pleaded in bar of the Idaho State Court action, and the Idaho State Courts (District and Supreme) having determined that said Superior Court did not have jurisdiction to make or enter said "Findings and Order," the judgment of the Idaho State Courts thereon, certiorari denied by this Court, is final, conclusive and *res judicata* in so far as the validity of said so-called Washington judgment is concerned, that matter having been put directly in issue in the Idaho State Court suit and the Idaho State Courts having had jurisdiction of all the parties (including petitioner herein) necessary to a determination of the action and also jurisdiction of the cause, the foregoing is true even though the Idaho State Courts erred in determining the jurisdiction of the said Superior Court of Spokane County, State of Washington.

It must be constantly kept in mind that the Idaho State Courts are the only courts other than the Federal Courts which have had jurisdiction of all the parties interested in this litigation. That all the parties appeared generally in the Idaho State Courts and presented their evidence. That the Idaho State Courts had at all times jurisdiction of the subject-matter of this action, all the issues referred to by the United States District Court and the Circuit Court of Appeals had been definitely settled as to all parties in the Idaho

State Courts. That the so-called Washington judgment had been pleaded as a bar to the Idaho State Court action. That the petitioner and her predecessor in interest in said stock, Mr. Pelkes, considering themselves aggrieved by the determination of said action in the Supreme Court of Idaho, petitioned this Court for a writ of certiorari to review the same. That such writ was denied by this Court.

The necessary facts and applicable law as to this are well stated by the United States Circuit Court of Appeals in its opinion herein as follows:

“On May 31, 1935, while the Idaho suit was pending, the Washington Court rendered a judgment to the effect that Pelkes was the owner of the stock and dividends in question, and that the Masons had no right, title or interest therein. In the interpleader suit, appellants pleaded the Washington judgment and alleged that the Idaho Court was thereby divested of whatever jurisdiction it might otherwise have had of the Idaho suit. The Masons denied this and asserted that the Washington judgment was itself void for want of jurisdiction. That issue—as to whether the Washington Court had jurisdiction to render the judgment relied on by appellants—had also been raised in the Idaho suit. The Idaho Court was empowered to determine that issue (*Pendleton v. Russell*, 144 U. S. 640, 644) and did determine it in favor of the Masons, holding the Washington judgment void for want of jurisdiction. The issue thus determined could not be relitigated in the interpleader suit.

“Whether the issues determined by the Idaho decree were rightly or wrongly determined, is no longer open to inquiry. Having been rendered by a court which had jurisdiction to render it, and having long since become final, that decree, even though erroneous, is valid and conclusive on the

parties thereto and all persons claiming under them. *Roche v. McDonald*, 275 U. S. 449, 454." (R. 352.)

In the Idaho State Court action, as stated by the Circuit Court of Appeals, the Judgment ("Findings and Order") of the Spokane Superior Court was pleaded in bar. The Idaho State Courts overruled that plea. The judgment of the Idaho State Courts then was *res judicata* as to that and "the issue thus determined could not be relitigated in the interpleader suit." That doctrine is clearly stated in *Cromwell v. County of Sac*, 94 U. S. 351:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *"

As stated by the Circuit Court of Appeals, whether the Idaho State Courts determined rightly or wrongly that the Spokane Superior Court did not have jurisdiction to make its "Findings and Order" of May 31, 1935, so far as the same attempted to affect the contract made in Idaho between the beneficiaries, Mr. Pelkes and Mrs. Mason, is no longer open to inquiry. The law as to that is stated in the following language in *Roche v. McDonald*, 275 U. S. 449, 454 and 455:

“* * * The court of Oregon had jurisdiction of the parties and of the subject-matter of the suit. Its judgment was valid and conclusive in that state. The objection made to enforcement of that judgment in Washington is, in substance, that it must there be denied validity because it contravenes the Washington statute and would have been void if rendered in a court of Washington; that is, in effect, that it was based upon an error of law. It cannot be impeached upon that ground. If McDonald desired to rely upon the Washington statute as a protection from any judgment that would extend the force of the Washington judgment beyond six years from its rendition, he should have set up that statute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, *he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive between the parties in that State, was equally conclusive in the courts of Washington, and under the full faith and credit clause should have been enforced by them.*” (Italics ours.)

The judgment entered by direction of the Supreme Court of Idaho, petition for certiorari thereon denied by this Court, is valid, final and conclusive. Even if the Idaho Court had misapprehended the Washington law, its judgment became final and conclusive in Idaho and was and is equally conclusive on the courts of Washington and the Federal courts.

III.

That, answering petitioner's argument, although the matter was properly determined as *res judicata*, had the Circuit Court of Appeals undertaken an examination of the State of Washington decisions and statutes it would

have found therefrom that said Spokane Superior Court sitting in probate had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry by said Superior Court of the decree of distribution in the Estate of Amelia Pelkes, deceased.

(1). That the Sunshine stock in question was distributed by the omnibus clause of the decree of distribution entered by said Spokane Superior Court on August 9, 1923.

Said decree of distribution after referring to the property therein described, included and distributed "any other property not now known or described, which may belong to said estate, or in which the said estate may have any interest," such provision is commonly known as as omnibus clause.

Such an omnibus provision is valid to pass title to property owned by an estate although omitted from the particular description.

Smith v. Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314;

Humphry v. Protestant Episcopal Church, 154 Cal. 170, 97 Pac. 187;

Heydenfeldt v. Osmont, 178 Cal. 768, 175 Pac. 1.

In *Humphry v. Protestant Episcopal Church*, supra, such a clause was held to pass title to an interest in real estate; and in *Heydenfeldt v. Osmont*, supra, to pass title to land omitted from a particular description. The last case was one where the decree of distribution was made under a compromise agreement. The Court further held that it represented a contemporaneous interpretation between the parties.

In *Bancroft's Probate Practice*, Sec. 1128, referring to the description of the property in a decree of distribution, that author states:

"It is customary to conclude the decree with an 'omnibus' clause to guard against omissions and failures in specific description. Under such a clause the whole of the residue, whether described or undescribed, known or unknown, may be distributed. Against collateral attack such a clause is sufficient to include land not mentioned, but shown by the evidence to have belonged to the decedent at the date of his death."

(2). That the Sunshine stock in question was actually distributed in 1923 by the executor and the two sole beneficiaries of the Will of Amelia Pelkes, deceased, the executor was one of said two beneficiaries, after entry of said decree of distribution, which distribution they had a right to make. (R. 188, 177 and 178.)

Under the law of the State of Washington no formal probate proceedings in court are necessary for the settlement of an estate.

In re Lambrecht's Estate, 112 Wash. 645, 192 Pac. 1018.

As a matter of fact Mr. Pelkes had between the time of entry of the decree of distribution, August 9, 1923, and November 8, 1933, sold, transferred and disposed of all of said 30,598 shares of Sunshine stock originally belonging to the marital community composed of John Pelkes and Amelia Pelkes, deceased, husband and wife.

(3). That since distribution was made, whether it be viewed that it was made by said omnibus clause or simply actually by the executor and sole beneficiaries, the "Findings and Order" entered by said Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a different distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes

and Mrs. Mason therein founded upon the contract admittedly made by those two in Idaho after August 9, 1923.

The Supreme Court of the State of Washington has never relaxed the rule as to the finality of a decree of distribution. In the late case of *Reagh v. Dickey*, 183 Wash. 564, 48 Pac. (2d) 941, 945, decided in 1935, that Court said:

"It certainly should be deemed thoroughly well settled by this time that a decree of distribution, such as that above referred to, is a final decree, as much so as a decree in any other proceeding in a court of equity, or any other court in this State."

Again in 1937 in the case of *O'Leary v. Bennett*, 190 Wash. 115, 66 Pac. (2d) 875, 878, that Court said:

"It is true the decree does not create the title in the distributees, but it is a solemn adjudication of who acquired the title of the deceased, and if rendered upon due process of law, is final and conclusive upon that question."

It must be remembered that the decree of distribution in the estate of Amelia Pelkes was entered by the Superior Court of Spokane County in the year 1923; that no appeal was taken therefrom and no attempt ever made to set aside the same. An action to accomplish the latter under the statutes of Washington could in any event not have been instituted more than one year after the entry of the decree of distribution.

After decree of distribution the Superior Court of Spokane County lost jurisdiction of the property distributed except to enforce the distribution decreed, and any subsequent order of that Court, "directing a different disposition to be made of a portion of the

property, was without authority, and consequently void." Such is the holding of the Supreme Court of Washington in the case of *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231, 232, wherein that Court says:

"The effect of such a decree (decree of distribution) is to vest the absolute right and title to the property in the distributees, and, therefore, the subsequent order of the Court, directing a different disposition to be made of a portion of the property was without authority and consequently void." (Words in parenthesis ours.)

In the late Washington case (1937) of *In re Cogswell's Estate*, 189 Wash. 433, 65 P. (2d) 1082, after decree of distribution entered certain beneficiaries of the estate petitioned in the probate proceedings,

"seeking a construction of the will and a decree of distribution in accordance therewith, * * * and citing the respondent (executrix) to appear and show cause why the petition should not be granted. The respondent appeared specially and challenged the jurisdiction of the court. The trial court held that it had no jurisdiction, and the citation was ordered quashed." (Word in parenthesis ours.)

The Supreme Court of Washington states:

"*The trial court held that, since the estate of Myron J. Cogswell had been closed by final decree (decree of distribution), it had no jurisdiction to issue citations therein. This rule is sound; such a citation would have no foundation.*" (Words in parenthesis and italics ours.)

The so-called Washington judgment on which the petitioner here relies, being that instrument dated May 31, 1935, entered by the Superior Court of Spokane County, entitled "Findings and Order Approving Partition, Correcting Receipts for Distributive

Shares, and Discharging Executor," was entered as the record herein shows on citation issued by said Superior Court more than eleven years after decree of distribution entered in said estate. It comes therefore clearly under the ban of the last cited as well as the other cases herein and by Judge Cavanah of the United States District Court cited from the Supreme Court of Washington.

Petitioner cites *In re Dyer's Estate*, 161 Wash. 498, 297 Pac. 196, as applicable to the situation here presented. The fundamental difference between that case and the instant one is that in the former the executor did not inventory or distribute the stock in question claiming the same as his separate property in which the estate had no interest, while in the instant case all parties admit that while not inventoried the stock in question was part of the estate, and it was actually distributed both by the omnibus clause of the decree and by Mr. Pelkes as executor in 1923. Mr. Pelkes after the time of the decree of distribution in 1923 actually sold part of the stock that belonged to him by virtue of such distribution. In fact the record shows that on May 31, 1935, when he secured an ex parte so-called judgment of the Superior Court of that date he had *distributed, sold and disposed of* all of the stock; that under no conceivable theory could it be said that he as executor or individually had, held or owned any of the stock upon which the so-called judgment could act.

Petitioner cites *State ex rel. Reser v. Superior Court*, 13 Wash. 25, 42 Pac. 630, as applicable to the situation here presented. That case has no application here, it merely deals with the right of an executor or administrator to discharge upon showing that he has made the distribution decreed by the decree of distribution. The Court in that case merely decided that:

"* * * Upon the filing of such purported receipts (of heirs), and an application for a final discharge, the court should direct a hearing, and a final order (of discharge) should be granted only upon a satisfactory showing to the court that the estate had in fact been fully distributed, * * * ." (Words in parentheses ours.)

(4). That the jurisdiction of the Spokane Superior Court sitting in probate to decide who was the owner of the stock in question was not sustained by the Supreme Court of Washington in this case, as the denial of a writ of prohibition without opinion by that Court is not "equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues * * *."

On page 24 of her brief the petitioner states that the jurisdiction of the Spokane Superior Court "to decide who was owner of the stock in question was sustained by the Supreme Court of Washington in this specific case."

Petitioner cites solely as authority for such statement an answer filed in this interpleader suit by Judge Hawkins of the Superior Court of Yakima County, Washington. Judge Hawkins in such answer says:

"Under the laws of the State of Washington, the denial of these applications for writs of prohibition by the Supreme Court of this State (Washington) was equivalent to a holding that the Superior Court had inherent jurisdiction to hear and decide the issues raised by the petition of Katherine Mason and the return of John Pelkes above referred to." (Word in parenthesis ours.)

Why Judge Hawkins made such a statement in his answer counsel does not know, but such is *not* the law of the State of Washington. The denial of a writ of

prohibition without opinion, as was true of the writs referred to by Judge Hawkins, is not a determination that the lower court has jurisdiction. The applicable statute is:

“The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. * * *”

Rem. Rev. Stat., Sec. 1015.

In accordance with said statute, therefore, two conditions must be present in order for a writ of prohibition to issue, namely, (1) lack of jurisdiction in the inferior tribunal and (2) lack of a plain, speedy and adequate remedy by appeal or otherwise in the ordinary course of law.

“We have so frequently held that a writ of prohibition will issue *only* where the trial court is threatening to proceed when he has no jurisdiction so to do, *and where there is no plain, speedy and adequate remedy by appeal or otherwise*, that we deem it unnecessary to cite cases.” (Italics ours.)

State ex rel. Chin v. Superior Court, 139 Wash. 449, 247 Pac. 738.

Thus, under the Washington law there is nothing to the contention that the Supreme Court of Washington by denying writs of prohibition ever decided that the Spokane Superior Court had jurisdiction to hear and decide the issues raised by the petition and return thereto in the matter of the Estate of Amelia Pelkes, deceased.

(5). That the United States District Court, although holding that the judgment entered by direction of the Supreme Court of Idaho was *res judicata* of the pending controversy, made an ex-

amination of the decisions and statutes of the State of Washington and came to the conclusion that the Spokane Superior Court sitting in probate, had no jurisdiction to determine the terms of the contract as to the Sunshine stock made in Idaho between Mr. Pelkes and Mrs. Mason subsequent to the entry of the decree of distribution by said Superior Court.

Judge Cavanah of the United States District Court in his opinion herein, says as to that:

“Under the laws of Washington, the Superior Court for Spokane County, sitting in probate, had jurisdiction and power to probate the estate of Amelia Pelkes under her will and render a decree of distribution of property then inventoried and unknown property of which she may have been possessed and when such decree was rendered, title was vested in the beneficiaries under the will; Remington's Revised Statutes of Washington, Sections 1371 and 1533. The effect of that decree and the interval between its entry and the final discharge of the executor is stressed by Evelyn Treinies and the administrator of the estate of John Pelkes as continuing the exclusive jurisdiction and power in the Superior Court of Washington, to decree and dispose of the shares of stock here involved. The decree of distribution of the personal property was a comprehensive and final one under the laws of Washington and if not appealed from cannot be collaterally attacked; *Alaska Banking and Safe Deposit Company v. Noyes et al.*, 117 Pac. 492; *Parr v. Davidson et al.*, 262 Pac. 959, and being so, the executor pursuant to that decree delivered the whole of the property of the estate to the beneficiaries, which passed out of the custody of the Superior Court of Washington. Nothing else was required of the executor to have been done, except to make final account to the court in which he was to report that he had

complied with the decree of distribution and delivered to the heirs the property decreed to them. No further order or confirmation of the court was required to have been made as to the shares of stock here involved, except the court may, *when a hearing is had for a distribution*, partition, among the persons entitled thereto, the estate held in common and undivided, and designate and distribute their respective shares to the end that the estate may be administered and distributed to those entitled thereto. Remington's Revised Statutes of Washington, Section 1533. Under such circumstances the jurisdiction of the probate court was closed as to the shares of stock here involved, after the heirs had made amicable division of their own property as no controversy then existed to which jurisdiction of the probate court could attach. The parties' interests in these shares of stock could be definitely, mathematically determined under the decree of distribution, as the decree gives to them a definite interest in the property which could be determined and partitioned by them, *as was done*, and the executor, when in dealing with the number of shares of stock, determined mathematically a definite number of shares to be delivered to the heirs, and therefore it would not have required a petition for partition to be filed with the court, after the final decree of distribution was made. The laws of the State of Washington provide that, after decree of distribution was rendered on August 9, 1923, the parties must move within the time required by the laws of Washington, if there is any dispute between them questioning the decree of distribution; Remington's Revised Statutes of Washington, Section 466, and the effect of such a decree of distribution, as said by the Supreme Court of Washington, is that 'it has all the force, effect, and finality of any other final judgment rendered by a Superior Court.' *In re Doane's Estate*, 116 Pac. 847, 849.

The Supreme Court of that State disposed of the theory as to the Superior Court sitting in pro-

bate continuing jurisdiction to adjudicate property of an estate after it was decreed in a decree of distribution, in the case of *In re Thompson's Estate*, 188 Pac. 784, 785, where it was held that after an heir had disposed of her interest in the estate she no longer could have a legal interest in the probate matter, and the probate court was not entitled to in any way consider it." (Italics ours.) (R. 332 and 333.)

Clearly from the foregoing it can only be concluded that the "Findings and Order" entered by the Spokane Superior Court on May 31, 1935, was void in so far as it attempted to make a different distribution of said Sunshine stock or attempted to determine the rights of Mr. Pelkes and Mrs. Mason therein founded upon the contract admittedly made by those two persons in Idaho after August 9, 1923.

The United States District Court herein (R. 336 and 337) quoted the following appropriate statement from the opinion of Mr. Justice Roberts in the case of *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522, 525 and 526:

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

These respondents submit that the decision of the

Circuit Court of Appeals affirming the decision of the United States District Court should be affirmed.

Respectfully submitted,

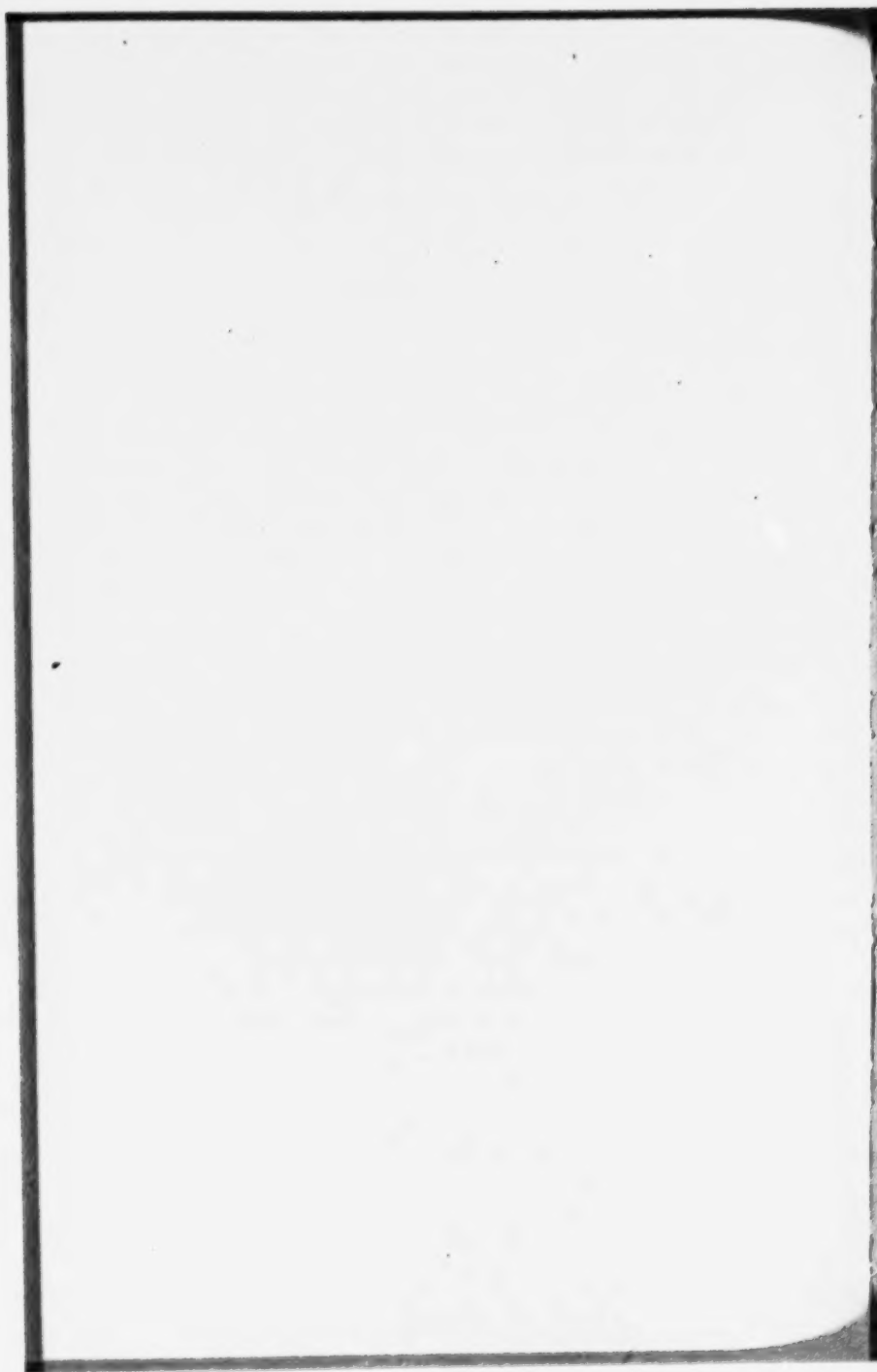
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rison, Grace G. Harrison, Walter H.
Hanson, Edna B. Hanson and F. C.
Keane.*

FRANK GRIFFIN,

Of Counsel.



SUPREME COURT OF THE UNITED STATES.

No. 4.—OCTOBER TERM, 1939.

Evelyn Treinies, Petitioner,

vs.

Sunshine Mining Company, Katherine
Mason, T. R. Mason, Lester S. Harri-
son, Grace G. Harrison, Walter H.
Hanson, Edna B. Hanson and F. C.
Keane.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Ninth Circuit.

[November 6, 1939.]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari was granted to review the action of the Court of Appeals for the Ninth Circuit in affirming¹ a decree of the District Court of Idaho² upon a bill of interpleader filed by the Sunshine Mining Company, a Washington corporation, against Evelyn H. Treinies and other citizens of the State of Washington, claimants to certain stock of the Sunshine Mining Company and the dividends therefrom, and Katherine Mason and T. R. Mason, her husband, and other citizens of the State of Idaho, adverse claimants to the same stock and dividends.

The occasion for the interpleader was the existence of inconsistent judgments as to the ownership of the Sunshine stock. The Superior Court of Spokane County, Washington, in administering the estate of Amelia Pelkes, adjudged that it was the property of John Pelkes, assignor of petitioner, Evelyn H. Treinies, and the District Court of Shoshone County, Idaho, adjudged that the same property belonged to respondent, Katherine Mason. They are the sole disputants. Other parties may be disregarded. On account of conflict between the judgments of the respective courts of sister states and the assertion of the failure to give full faith and credit to both in the interpleader action, we granted certiorari.

¹ 99 F. (2d) 651.

² 19 F. Supp. 587.

The alleged rights of the respective claimants arose as follows: Amelia Pelkes, the wife of John Pelkes, died testate in Spokane, Washington, in 1922, leaving her husband and one child, Katherine Mason, the offspring of a former marriage, as the beneficiaries of her will. As a part of her community estate, there were 30,598 shares of Sunshine Mining stock. It was considered valueless and was not inventoried or appraised. The order of distribution assigned a three-fourths undivided interest in these shares to Pelkes and a one-fourth to Mrs. Mason, an omnibus clause covering unknown property. The estate of Mrs. Pelkes was not distributed according to the order of distribution. Instead Pelkes and his step-daughter, Mrs. Mason, divided the inventoried property between themselves in accordance with their wishes.

It is the contention of Pelkes and his assignee that this partition of the property was in consideration of the release by Mrs. Mason to Pelkes of all of her interest in the shares of the stock of the Sunshine Mining Company. On the other hand, Mrs. Mason asserts that Pelkes was to hold one-half of the amount owned, 15,299 shares, in trust for her.

In August, 1934, Mrs. Mason instituted a suit in the District Court of Idaho for Shoshone County against Pelkes, Evelyn H. Treinies, the Sunshine Mining Company, and others not important here, alleging that she was the owner of 15,299 shares of the stock, that these had been acquired by Miss Treinies from Pelkes with knowledge of Mrs. Mason's rights, and praying that the trust be established and the stock and dividends be awarded to her, Mrs. Mason. It was finally decreed by the District Court on August 18, 1936, after an appeal to the Supreme Court of Idaho,³ that the stock and dividends belonged to Mrs. Mason. Certiorari to the Supreme Court of Idaho was refused by this Court.⁴

Before the entry of the first decree of the District Court of Idaho, Katherine Mason filed a petition in the Superior Court of Spokane County, Washington, in the probate proceedings involving Amelia Pelkes' will, to remove the executor, John Pelkes, for failure to file his report of distribution and for dissipation of the Sunshine stock. Pelkes by cross-petition and petition claimed the stock. Thereupon

³ 57 Idaho 10.

⁴ 299 U. S. 615.

Mrs. Mason applied to the Supreme Court of Washington for a writ of prohibition against further proceedings in the Superior Court on the ground of lack of jurisdiction in that court to determine the controversy over the stock. The writ was refused. On May 31, 1935, a judgment was entered in the Superior Court upholding in full the ownership of Pelkes.

After the Supreme Court of Idaho had decided the Idaho suit against Pelkes and Miss Treinies, they filed in August, 1936, a suit in the Superior Court of Washington against Katherine Mason and others alleging that they were the owners of the stock, further alleging that the Idaho decree was invalid for lack of jurisdiction, and asking that their title to the stock be quieted and the Sunshine Mining Company, a party to this and the Idaho suit, be compelled to recognize their ownership. It was at this point in the litigation that the Sunshine Company filed the bill of interpleader now under consideration. Further proceedings in the suit to quiet title were enjoined by the District Court in this action.

Jurisdiction.—Before considering the questions raised by the petition for certiorari, the jurisdiction of the federal court under the Act of January 20, 1936,⁵ must be determined. As this issue affects the jurisdiction of this Court, it is raised on its own motion.⁶ By the Act of January 20, 1936, the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states. The suit may be maintained "although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another." Process may run at least throughout all the states.

As required by the Act this case was begun by the complainant, a corporation of the State of Washington, impleading one group of claimants who are citizens of that same state and another, the adverse group, who are citizens of Idaho. Under the interpleader act, this identity of citizenship is permissible since diversity only between claimants is required. The Interpleader Act is based upon the clause of Section Two, Article III, of the Constitution which extends the judicial power of the United States to controversies

⁵ 49 Stat. 1096, 28 U. S. C. § 41(26).

⁶ *Mansfield, C. & L. M. Ry. v. Swan*, 111 U. S. 379, 384.

"between citizens of different States." Is this grant of jurisdiction broad enough to cover the present situation?

The Judicial Code, Section 24, provides for original jurisdiction of suits of a civil nature between citizens of different states in precisely the language of the Constitution. The present wording is practically the same as that of the Act of March 3, 1875,⁷ "the circuit courts . . . shall have original cognizance . . . of all suits . . . in which there shall be a controversy between citizens of different States," and that of the original Judiciary Act of September 24, 1789,⁸ "the suit is between a citizen of the State where the suit is brought and a citizen of another State." Without ruling as to possible limitations of the constitutional grant, it is held by this Court that the statutory language of the respective judiciary acts forbids suits in the federal courts unless all the parties on one side are of citizenship diverse to those on the other side.⁹ For the determination of the validity of the Interpleader Act we need not decide whether the words of the Constitution, "Controversies . . . between Citizens of different States," have a different meaning from that given by judicial construction to similar words in the Judiciary Act. Even though the constitutional language limits the judicial power to controversies wholly between citizens of different states, that requirement is satisfied here.¹⁰

This is for the reason that there is a real controversy between the adverse claimants. They are brought into the court by the complainant stakeholder who simultaneously deposits the money or property, due and involved in the dispute, into the registry of the court. This was done in this case. The act provides that the "court shall hear and determine the cause and shall discharge the complainant from further liability." Such deposit and discharge effectually demonstrates the applicant's disinterestedness as between the claimants and as to the property in dispute,¹¹ an essential

⁷ 18 Stat. 470.

⁸ 1 Stat. 78.

⁹ *Strawbridge v. Curtiss*, 3 Cranch 267; *Camp v. Gress*, 250 U. S. 308, 312.

¹⁰ Cf. *Chafee, Interpleader in the United States Courts*, 41 Yale L. J. 1134, 1141, 1165; and *Chafee, The Federal Interpleader Act of 1936*, 45 Yale L. J. 963, 973.

¹¹ Diversity requirements for federal equity jurisdiction to avoid a multiplicity of suits from diverse claimants with claims contested by the debtor is not involved. Cf. *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 70.

interpleaders.¹² The complainant is a proper party for the determination of the controversy between the adverse claimants, citizens of different states. Their controversy could have been settled by litigation between them in the federal courts. Under similar circumstances as to parties, this Court ruled that a removal of separable controversies to the federal court was permissible even though a proper defendant was a citizen of the same state as the plaintiff.¹³ It so held as to a stakeholder in *Salem Co. v. Manufacturers' Co.*¹⁴ Where a suit was brought in a state court against the Manufacturers' Company, a Delaware corporation, and against a cocitizen of plaintiff, a Massachusetts corporation, the International Trust Company. The Manufacturers' Company removed and plaintiff sought a removal alleging its cocitizen was a necessary party. The suit was to determine rights to a fund in the cocitizen's hands "and to have the same paid to" the plaintiff. The right of removal was upheld on the ground that the only obligation of the stakeholder was to pay for the money deposited with it. In *Cramer v. Phoenix Mut. Life Ins. Co.*¹⁵ the Circuit Court of Appeals for the Eighth Circuit, considering that the claimants were the real contestants, construed the Interpleader Act of May 8th, 1926,¹⁶ to give jurisdiction to the federal court although the interpleader and certain claimants were citizens of the same state. The language as to citizenship is the same as that of the act here involved.¹⁷

Application of Interpleader Act.—The inclusion as defendants of the judge of the Superior Court of Washington, the adminis-

Sanders v. Fertilizer Works, 292 U. S. 190, 200; *Killian v. Ebbinghaus*, U. S. 568, 571.

Barney v. Latham, 103 U. S. 205, 213; cf. *Pullman Co. v. Jenkins*, 305 U. S. 534, 538.

264 U. S. 182, 189.

91 F. (2d) 141, 146. See also *Mutual Life Ins. Co. v. Lott*, 275 F. 365, (S. D. Cal.); *New York Life Ins. Co. v. Cross*, 7 F. Supp. 130 (S. D. N. Y.); cf. *Eagle, Star and British Dominions v. Tadlock*, 14 F. Supp. 933 (D. Cal.), reversed, 91 F. (2d) 481 (C. C. A. 9); *Ackerman v. Tobin*, 91 F. (2d) 541 (C. C. A. 8).

44 Stat. 416.

We do not determine whether the ruling here is inconsistent with the inclusion in those cases where jurisdiction was rested on diversity of citizenship between the applicant and cocitizens who are claimants. (*Mallory v. Life Assurance Soc.*, 87 F. (2d) 233 (C. C. A. 7), cert. denied, 301 U. S. 661 (New York corporation impleads Illinois claimants); *Security Trust & Savings Bank of San Diego v. Walsh*, 91 F. (2d) 481 (C. C. A. 9) (English corporation impleads California claimants); *Penn Mut. Life Ins. Co. v. Quire*, 13 F. Supp. 967, 971 (W. D. Ky.) (Pennsylvania corporation impleads Kentucky claimants); *Turman Oil Co. v. Lathrop*, 8 F. Supp. 870, 872 (D. Okla.) (Delaware corporation impleads Oklahoma claimants).)

trator of John Pelkes, and a court receiver of the property in dispute is said to violate the rule against a citizen suing a state embodied in the Eleventh Amendment.¹⁸

Without analyzing all the pleadings, a short answer against the petitioner's contention is the fact that neither the receiver nor the judge is enjoined by the final decree. Pelkes' administrator and Miss Treinies are enjoined from further prosecution of the Washington action to quiet title. They are the parties whose individual rights to the stock are settled in this action. The State of Washington has no interest and no infringement of the Eleventh Amendment occurs.

Neither are the provisions of Section 265 of the Judicial Code applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader Act, passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power. Section 265 is a mere limitation upon the general equity powers of the United States courts and may be varied by Congress to meet the requirements of federal litigation.¹⁹

Res Judicata of the Idaho Decree.—On the merits petitioner's objection to the decree below is that it fails to consider and give effect to the Washington judgment of May 31, 1935, awarding the property in question to Pelkes, petitioner's assignor. It is petitioner's claim that the Washington judgment must be considered as effective in this litigation because the question of the jurisdiction of the Washington court was actually litigated before the Supreme Court of Washington and determined favorably to petitioner by the refusal to grant a writ of prohibition against the exercise of jurisdiction by the Washington Superior Court in probate. This failure to give effect to the judgment is said to infringe the full faith and credit clause of the Constitution. The decree of the Court of Appeals is based upon the doctrine of *res judicata*. The applicability of that doctrine arises from a determination of pertinent matters by the Supreme Court of Idaho. Accordingly we turn to a discus-

¹⁸ Worcester County Trust Co. v. Riley, 302 U. S. 292, 296, is relied upon.

¹⁹ Smith v. Apple, 264 U. S. 274, 278; Dugas v. American Surety Co., 300 U. S. 414, 428.

sion of whether or not the issues tendered below by petitioner were foreclosed by the decision of the Supreme Court of Idaho of July 23, 1936.

The issues tendered by petitioner in the trial court in this interpleader proceeding were (1) the invalidity of the Idaho decree, and (2) the conclusiveness of the Washington decree of May 31, 1935, awarding the property to Pelkes. Both of these issues rest on petitioner's contention that complete jurisdiction of the probate of Mrs. Pelkes' estate was in the Superior Court of Washington, that the stock was at all times a part of that estate, and that therefore that court's jurisdiction over the disposition of the stock was exclusive of all other courts.

The Idaho decree was pleaded in this proceeding as *res judicata* of the controversy between petitioner and respondent. The proceedings in Idaho showed a cause of action based on an alleged oral agreement of Pelkes, made in Idaho at the time of distribution of Mrs. Pelkes' estate, to hold the Sunshine Mining Company stock in trust for the joint benefit of himself and Mrs. Mason. All parties, including this petitioner, were before the court and a decree was entered sustaining the trust and awarding the stock and dividends, as claimed, to respondent, Mrs. Mason, with directions to the Mining Company to recognize the assignment of the certificates and adjudging a recovery for prior dividends against Pelkes and petitioner. The Idaho court was a court of general jurisdiction.²⁰

The Court of Appeals held that the Idaho suit settled that the stock was distributed in 1923 and that therefore the Idaho court had jurisdiction to determine rights under the alleged oral trust. It was further of the view that the Idaho court's invalidation of the Washington judgment and its decree upholding Mrs. Mason's claim to the disputed property were *res judicata* in this action. Petitioner's only ground for objection to the conclusion that the Idaho decree is *res judicata* rests on the argument that by such ruling below the "judgment of the courts of the State of Washington affecting the same subject matter and parties" is ignored.

In the Idaho proceeding the Washington judgment awarding the stock and dividends to Pelkes was pleaded in bar to Mrs. Mason's suit to recover the stock. The effectiveness of the Washington judgment as a bar depended upon whether the court which rendered it had jurisdiction, after an order of distribution, to deal with settle-

²⁰ Constitution of Idaho, Art. 5, § 20; Idaho Code, 1932, § 1-705.

ments of distributees with respect to the assets of an estate. On consideration it was determined in the Idaho proceeding that the Washington court did not have this jurisdiction and that the stock of the Mining Company became the property of Mrs. Mason. In declining to give effect to the Washington decree for lack of jurisdiction over the subject matter, the Idaho court determined also the basic question raised by petitioner in the interpleader action. The contention of petitioner in the interpleader proceedings that the Idaho court did not have jurisdiction of the stock controversy because that controversy was in the exclusive jurisdiction of the Washington probate court must fall, because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceedings. If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings. While petitioner sought review from the decree of the Supreme Court of Idaho by petition for certiorari to this Court, which was denied, no review was sought from the final decree of the Idaho District Court of August 18, 1936, on new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho.²¹

The Court of Appeals correctly determined that the issue of jurisdiction *vel non* of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court

²¹ It is unnecessary to consider whether the Idaho determination as to the jurisdiction of the Washington court was properly made. As the procedure by which a state court examines into the question of the jurisdiction of the court of a sister state is a matter within the control of the respective states (*Adam v. Saenger*, 303 U. S. 59, 63), it need only be added that such procedure is subject to question only on direct appeal.

It was stipulated by all parties to the Idaho cause that the Idaho courts might take judicial notice of the statutes and decisions of Washington. Some constitutional and statutory provisions relating to the jurisdiction of the Superior Court were pleaded and admitted. It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state and that without allegation and evidence it will be assumed the laws are the same as those of Idaho. (*Maloney v. Winston Bros.*, 18 Idaho 740, 757, 762; *Douglas v. Douglas*, 22 Idaho 336, 343; *Mechanics and Metals Nat. Bk. v. Pingree*, 40 Idaho 118, 129; *State v. Martinez*, 43 Idaho 180, 192; *Kleinschmidt v. Scribner*, 54 Idaho 185, 189). While none of these cases involved a stipulation, the decision of the Supreme Court of Idaho (57 Idaho 10) declares the law of that jurisdiction. It follows from the Idaho court's refusal to look into the statutes of Washington that the jurisdiction of the Washington court was presumed to be governed by Idaho law. Under proper proof, the Idaho court would have been compelled to examine the jurisdiction of the Washington court under Washington law.

of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.

The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question.²² Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.²³

One trial of an issue is enough.²⁴ "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,"²⁵ as well to jurisdiction of the subject matter as of the parties.²⁶

Decree affirmed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

²² Old Wayne Life Assn. v. McDonough, 204 U. S. 8, 15; Thompson v. Whitman, 18 Wall. 457, 468; Adam v. Saenger, 303 U. S. 59, 62.

²³ Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 30; Stoll v. Gottlieb, 305 U. S. 165, 172; Roche v. McDonald, 275 U. S. 449, 454.

²⁴ Baldwin v. Traveling Men's Assn., 283 U. S. 522, 525.

²⁵ American Surety Co. v. Baldwin, 287 U. S. 156, 166.

²⁶ Stoll v. Gottlieb, *supra*, Note 23, 172.

No decision or statute relative to the reexamination of the decree or judgment of an Idaho court on a contested issue of jurisdiction has been found or called to our attention. It is concluded that the rule here expressed states too the law of Idaho.